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Religion, Speech, and the Minnesota Constitution: State-based Protections Amid First Amendment Instabilities

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RELIGION, SPEECH, AND THE MINNESOTA CONSTITUTION: STATE-BASED PROTECTIONS AMID FIRST AMENDMENT INSTABILITIES

Steven P. Aggergaard[†]

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I. INTRODUCTION

With the United States Supreme Court shifting both in its composition and how it interprets the First Amendment, the Minnesota Constitution's provisions on religion and speech are poised to emerge from the mist. It has happened before. In 1990, after the Supreme Court reinterpreted the First Amendment's Free Exercise Clause, the Minnesota Supreme Court was first to use a state constitution to retain strict scrutiny as the relevant constitutional standard.¹

Today, the First Amendment's Establishment Clause may be ripe for reinterpretation. Justice Clarence Thomas issued three concurrences in 2004 and 2005 suggesting that the Establishment Clause should not apply to the states.² Last term's conflicting five-to-four holdings on where counties may post the Ten Commandments in courthouses adds to the confusion, which likely will be exacerbated as Justices depart and as some members of Congress and their constituents call for more religiousness in

1. *State v. Hershberger*, 462 N.W.2d 393, 397-98 (Minn. 1990) (departing from *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)); Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, 281 (1993) (explaining that Minnesota was first to "take a stand" against the weakened standard). Maine, Massachusetts, and Washington followed. *See* *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *Soc'y of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992).

2. Justice Thomas's rationales are that states freely endorsed religion before the nation's founding and that the Establishment Clause does not protect an individual right that states are bound to respect under the Fourteenth Amendment. *See* *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Thomas, J., concurring) (urging a "fundamental rethinking of our Establishment Clause jurisprudence"); *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2126 n.3 (2005) (Thomas, J., concurring) (observing that text and history suggest that Establishment Clause does not apply to state governments); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50-51 (2004) (Thomas, J., concurring) (observing that six states had established religions at nation's founding). The First Amendment's Establishment Clause, which commands that "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, was made applicable to state governments in *Everson v. Board of Education*, 330 U.S. 1 (1947). Justice Thomas is not alone in advocating for *Everson's* reversal. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32-42 (1998); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 100-01, 143-45 (1982).

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society.³ As for free speech, the Court struggled last term to define “government speech”⁴ and refused to hear a case that could have helped standardize state and federal laws on when journalists may avoid subpoenas.⁵

The Minnesota Constitution’s provisions that prohibit religious establishment and ensure self-expression through worship and speech stand ready to help. But the state constitution often lies dormant in actions involving speech and establishment of religion. When it is pled, the state’s courts frequently ignore the plain language and instead search for “framers’ intent.” In addition, courts commonly use federal precedent to interpret the state provisions even though the state and federal constitutional provisions are markedly different and even though the state Bill of Rights protected Minnesotans decades before the First Amendment did.⁶

To be sure, it seems inappropriate to use *only* the state constitution in many situations, such as when commercial speech or Internet pornography crosses state or national borders. But in cases confined to Minnesota, such as those involving protest speech and nearly all things related to religion, the state constitution is well-positioned to balance competing interests and to enable Minnesota community standards to be imposed in Minnesota-centric cases.

The purpose of this Article is to increase awareness of the Minnesota Constitution’s religion and speech provisions by providing a practical resource for lawyers and judges who

3. *McCreary County v. Am. Civil Liberties Union*, 125 S. Ct. 2722 (2005); *Van Orden*, 125 S. Ct. 2854 (2005); see also David D. Kirkpatrick, *Conservatives to Seek Voters’ Support for Commandments*, N.Y. TIMES, June 29, 2005, at A18 (describing movement to introduce constitutional amendment ensuring school prayer and public displays of Ten Commandments).

4. *Johans v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055, 2064 (2005) (holding 5-4 that beef producers may be compelled to subsidize federal “government speech” through advertisements).

5. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005). Thirty-one states and the District of Columbia have statutes protecting journalists from forced disclosure of confidential sources or newsgathering materials. See *id.* at 978-79 (Sentelle, J., concurring); see also MINN. STAT. §§ 595.021-.025 (2004) (Minnesota’s shield law).

6. It is generally acknowledged that the First Amendment’s free-speech guarantees were extended to the states in *Gillow v. New York*, 268 U.S. 652 (1925), and the Amendment’s religion clauses in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947). ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 977, 1237 (2001).

prosecute, defend against, and decide religion and speech cases.⁷ Part II examines the text and history of the state religion and speech provisions, explains that state action has been required even when the plain constitutional language does not demand it, and argues that gauging “framers’ intent” is unwise if not impossible. Part III discusses cases related to the state constitution’s provisions on establishment of religion, particularly in the school-funding context. Part IV examines the well-developed “freedom of conscience” protections and explains when jurisdiction and standing are found not to infringe on religious exercise in cases involving churches. Part V surveys the state constitution’s speech and press protections, which consistently have been interpreted to parallel the First Amendment.

II. STATE CONSTITUTIONAL PROVISIONS AND APPLICATIONS

A. *Relevant Constitutional Texts and History*

States may enact constitutional protections stronger than what the United States Constitution ensures, and state supreme courts may interpret their constitutions in any way that does not violate federal law.⁸ However, “the state may not raise its constitutional protection for a particular civil liberty so far above the federal floor that it bumps against the federal floor for some other competing civil right”⁹ For example, if the Minnesota Supreme Court were to hold that protesters had a state constitutional right to protest on private property, it would risk violating the property owner’s First Amendment right against sponsoring speech with which the owner does not agree.¹⁰

7. The author is privileged to augment the practice-oriented materials in which the state religion and speech provisions are examined. See MARY JANE MORRISON, *THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE* (2002) [hereinafter MORRISON, *THE MINNESOTA STATE CONSTITUTION*]; John M. Baker, *The Minnesota Constitution As a Sword: The Evolving Private Cause of Action*, 20 WM. MITCHELL L. REV. 313 (1994); Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: “Wrapt in the Old Miasmal Mist,”* 7 HAMLINE L. REV. 51, 56-57 (1984); Fred L. Morrison, *An Introduction to the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 287 (1994) [hereinafter Morrison, *Introduction to the Minnesota Constitution*].

8. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 19 (7th ed. 2004).

9. John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227, 234 (1994).

10. John Devlin, *Constructing an Alternate to “State Action” as a Limit on State*

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Most of the Minnesota Constitution's provisions related to religion and speech are found in article I, the Bill of Rights. Article I, section 3 reads:

The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.¹¹

This language is original to the Minnesota Constitution of 1857.¹² Two-thirds of state constitutions have similar language.¹³ Unlike the First Amendment, article I, section 3 anticipates that a speaker may be punished and on its face does not require state action.

Article I, section 16, the freedom of conscience clause, reads:

The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.¹⁴

This language also is unchanged from 1857 and its origins are traced to the New York Constitution of 1777, which predates the federal Bill of Rights by fourteen years.¹⁵ While some state constitutions broadly protect "all actions stemming from religious

Constitutional Rights Guarantees: A Survey, Critique, and Proposal, 21 RUTGERS L.J. 819, 820, 826 n.30 (1990); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (holding that private parade organizers need not include gay contingent because parade as a whole is expressive and the organizers have "autonomy to choose the content").

11. MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 35.

12. *Id.*

13. *State v. Wicklund*, 576 N.W.2d 753, 756 (Minn. Ct. App. 1998), *aff'd*, 589 N.W.2d 793 (Minn. 1999).

14. MINN. CONST. art. I, § 16.

15. *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (Simonett, J., concurring).

conviction,” those in Minnesota and New York are tailored toward protecting “worship.”¹⁶ It is common for state religion clauses to deny protections for practices that violate “peace and safety.”¹⁷

Article I, section 17 prohibits conditioning public-office candidacies, voter eligibility, and judicial witness competency on religious belief:

No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.¹⁸

This section is substantively unchanged since 1857¹⁹ and its religion-oriented provisions rarely litigated.²⁰

Although not in the Minnesota Bill of Rights, article XIII, section 2 is inseparable from this Article’s analysis. It reads:

In no case shall any public money or property be

16. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456, 1460 (1990); see also RJ&L Religious Liberty Archive, State Constitutions, <http://www.churchstatelaw.com/stateconstitutions> (last visited Oct. 31, 2005) (compiling state constitutional provisions on religion).

17. McConnell, *supra* note 16, at 1464. In a recent article, Utah Supreme Court Chief Justice Christine M. Durham observed that although the peace-and-safety clauses sometimes are seen as restricting religious liberty, they “are more accurately interpreted as restrictions on state power.” Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitutional Religion Clauses*, 38 VAL. U. L. REV. 353, 359 (2004).

18. MINN. CONST. art. I, § 17.

19. MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 128.

20. It appears that the Minnesota Supreme Court has addressed article I, section 17 in the religion context only once. In *State v. Peterson*, the court affirmed, excluding evidence that a trial witness did not believe in God. 208 N.W. 761, 764, 167 Minn. 216, 222-23 (1926). In her treatise on the Minnesota Constitution, Professor Mary Jane Morrison references “unexplored tension” between *Peterson* and *In re Collection of Delinquent Real Property Taxes*, 530 N.W.2d 200, 205 (Minn. 1995), where the Minnesota Supreme Court applied a “subjective test” to hold that an entity was not a church for tax-exemption purposes under statute or article X, section 1 of the Minnesota Constitution. Morrison observes that “probable resolution of this tension” may be found by concluding that a person may not be excluded from being a witness on account of her religious beliefs, but her beliefs may be subject of inquiry for credibility purposes should she take the stand to testify, at least when she is testifying in self-interest about being entitled to favorable tax treatment because of being a religious believer.

MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 128-29.

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appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.²¹

This section's origins are traced to an 1877 constitutional amendment.²² It is sometimes characterized as among the anti-Catholic "Blaine Amendments" that states adopted after Congressman James G. Blaine failed at amending the federal constitution in 1876 to prohibit aid to sectarian schools.²³

These provisions, along with the Minnesota Constitution's Preamble,²⁴ were for many decades the sole constitutional protections related to Minnesotans' speech and religion rights.²⁵ Yet for most of Minnesota's statehood, the provisions have lain largely dormant as courts held that individual rights were inferior to the state's police power. Ultimately, Minnesota's failure to protect speech liberties under state law prompted the United States Supreme Court to incorporate the First Amendment's speech clause through the Fourteenth Amendment's Due Process Clause.²⁶

21. MINN. CONST. art. XIII, § 2.

22. MORRISON, *THE MINNESOTA STATE CONSTITUTION*, *supra* note 7, at 292. In *Locke v. Davey*, the United States Supreme Court held that similar language in the Washington Constitution does not violate the First Amendment's Free Exercise Clause. 540 U.S. 712, 719, 725 (2004) (examining WASH. CONST. art. I, § 11).

23. Craig Westover, *Constitutionality Is a False Issue*, ST. PAUL PIONEER PRESS, Feb. 22, 2005, at 6B ("Article 13, Section 2 of the Minnesota Constitution was born in bigotry"); *see also* Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion) (Thomas, J.) ("This doctrine, born of bigotry, should be buried now."). The failed federal Blaine Amendment read:

No state shall make any law respecting the establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State, for the support of the public schools or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 n.2 (1992) (citing 4 CONG. REC. 5453 (1876)). Professor Green observes that the Blaine Amendment "does not fit neatly into a modern-day schemata." *Id.* at 41. Nevertheless, he cites authority indicating that the amendment was targeted toward Catholics who sought public money for schools they had established to counter "obvious evangelical Protestant overtones to public education." *Id.*

24. "We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution." MINN. CONST. pmbl.

25. Fleming & Nordby, *supra* note 7, at 56-57.

26. *See* Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (under First and Fourteenth Amendments, invalidating Minnesota law permitting "nuisance"

After incorporation, state courts essentially ceded power to enforce individual rights to the federal courts.²⁷ This was particularly true from the mid-1950s through the 1960s as Chief Justice Earl Warren steered the Supreme Court through landmark civil rights and First Amendment cases.²⁸ One was *New York Times v. Sullivan*, which limited use of state defamation law to punish speech about public officials.²⁹ Another was *Sherbert v. Verner*, which held state laws restricting religious free exercise to the strictest scrutiny.³⁰ After *Sherbert*, a “subtle shift of emphasis in the state courts from state to federal constitutional law is observable,” including in Minnesota where “there was no longer any mention of the state constitution; it had, in effect, vanished from the [Minnesota Supreme Court] opinions’ texts and presumably from the court’s consideration.”³¹ The power of federal strict scrutiny “pushed state constitutional texts to the margins,”³² and “state constitutional analysis of free exercise claims was all but abandoned in the thirty years following the Supreme Court’s decision in *Sherbert v. Verner*.”³³

However, by 1977, the Supreme Court’s orientation toward individual liberties had weakened, and Justice William Brennan wrote a *Harvard Law Review* article urging states to employ the “font of individual liberties” in their state constitutions and not to view

newspapers to be shut down); *Gilbert v. Minnesota*, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (criticizing Minnesota law that prohibited antiwar speech).

27. Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 382 (1980); Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 5 VAND. L. REV. 620, 642 (1951); see also *Commonwealth v. Gilfedder*, 73 N.E.2d 241, 245 (Mass. 1947) (observing that United States Supreme Court had occupied “the field” of free-speech law such that it would be “academic and futile” to examine Massachusetts constitution); *Glover v. Minneapolis Bldg. Trades Council*, 10 N.W.2d 481, 482, 215 Minn. 533, 535 (1943) (“decisions of the Supreme Court of the United States control decision in the instant case” involving labor pickets of nonlabor job site).

28. Fleming & Nordby, *supra* note 7, at 61; see also MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 1, 35, 66 (1998).

29. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

30. 374 U.S. 398 (1963).

31. Carmella, *supra* note 1, at 298.

32. *Id.*

33. Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Clauses of Their Own Constitutions in the Wake of Employment Division v. Smith*, 67 TEMP. L. REV. 1017, 1019 (1994). States traditionally were “far more comfortable” developing state constitutional precedent on religious establishment claims. Carmella, *supra* note 1, at 319; Durham, *supra* note 17, at 362.

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federal decisions as “dispositive of questions regarding rights guaranteed by counterpart provisions of state law”.³⁴

Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.³⁵

State courts were then “deluged” with state constitutional claims, many related to search and seizure.³⁶ Few were related to speech³⁷—reflective, perhaps, of the United States Supreme Court’s aversion to a “paternalistic” approach to restricting speech.³⁸ But the Minnesota Constitution’s protections for individual rights lay largely dormant. This prompted Terrence Fleming (a former Minnesota Supreme Court law clerk) and Jack Nordby (a Twin Cities attorney and eventual Hennepin County judge) to write a 1984 *Hamline Law Review* article aptly titled *The Minnesota Bill of Rights: Wrapt in the Old Miasmal Mist*.³⁹ The authors criticized Minnesota attorneys for rarely invoking the Minnesota Bill of Rights and encouraged the bench to meet its “obligation” to employ the Minnesota Constitution independently.⁴⁰

Then, in 1990, the Warren Court’s opinion in *Sherbert v. Verner*⁴¹ was largely overruled as the Court held in *Employment Division v. Smith*⁴² that strict scrutiny no longer controlled most free

34. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 502 (1977).

35. *Id.* at 502.

36. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1031 (2003).

37. Devlin, *supra* note 10, at 831-34.

38. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 585-86 (2004) (explaining that since 1976, antipaternalism—the idea that government is ill-equipped to control speech for citizens’ own good—“has percolated in most of the Court’s commercial speech cases . . . [and] has seeped into other areas of First Amendment law”).

39. See Fleming & Nordby, *supra* note 7.

40. *Id.* at 53, 57.

41. 374 U.S. 398 (1963).

42. 494 U.S. 872 (1990).

exercise claims.⁴³ “Following the Supreme Court’s decision in *Smith*, interest in state constitutional protections for religious liberty surged.”⁴⁴ In light of *Smith*, the Court remanded *State v. Hershberger*, a case in which the Minnesota Supreme Court had held that Amish buggy drivers were exempted from certain traffic laws under the First Amendment.⁴⁵ On remand, the Minnesota court became first in the nation to “take a stand” against *Smith* by employing the state constitution to preserve strict scrutiny in free exercise claims.⁴⁶

After *Hershberger*, the Minnesota Supreme Court endorsed independent state-constitutional standards for search and seizure,⁴⁷ equal protection,⁴⁸ abortion funding,⁴⁹ and right to counsel after drunken driving arrests.⁵⁰ In 1994, the *William Mitchell Law Review* published its first issue dedicated solely to state constitutional law.⁵¹ But the speech provision remained dormant. While a handful of

43. *Id.* at 883-85 (distinguishing *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Supreme Court has retained strict scrutiny for laws that purposefully restrict religious practices, such as those prohibiting animal sacrifice. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

44. *Durham*, *supra* note 17, at 366.

45. *Minnesota v. Hershberger*, 495 U.S. 901 (1990) (remanding *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989)).

46. *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990); *Carmella*, *supra* note 1, at 281.

47. *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 186 (Minn. 1994) (departing from *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990), a “radical departure” from Minnesota precedent prohibiting temporary traffic road blocks); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 780-83 (Minn.1993) (departing from *California v. Hodari D.*, 499 U.S. 621 (1991), a “sharp departure” from Minnesota precedent on when seizure occurs). In recent years, article I, section 10 of the Minnesota Constitution has assumed independence from the Fourth Amendment to the United States Constitution, even though the provisions are textually identical. See *State v. Carter*, 697 N.W.2d 199 (Minn. 2005) (departing from federal cases on when a drug-detection dog may be employed to “sniff” outside a rented self-storage locker); *State v. Askerooth*, 681 N.W.2d 353, 367-71 (Minn. 2004) (departing from Fourth Amendment on squad-car detentions and police officers’ requests for consent to search); *State v. Fort*, 660 N.W.2d 415, 418-19 (Minn. 2003) (holding that police officers may not expand the scope of a routine traffic stop without reasonable suspicion of criminal activity); *State v. Wiegand*, 645 N.W.2d 125, 132 (Minn. 2002) (holding that reasonable suspicion is required before police officers may seize and perform a drug-detecting dog sniff on a motor vehicle).

48. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991).

49. *Women of the State of Minn. v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (rejecting *Harris v. McRae*, 448 U.S. 297 (1980)).

50. *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833-34 (Minn. 1991).

51. 20 WM. MITCHELL L. REV. 227-588 (1994).

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state supreme courts adopted independent free speech protections during the 1990s,⁵² the Minnesota Supreme Court signaled several times during the decade that article I, section 3 *could* offer protections greater than the First Amendment, but to date has not so held.⁵³

Still, the renewed interest in the state Bill of Rights prompted now-Judge Nordby to write of a “renaissance of constitutional recognition” in a Foreword he penned to a 2002 treatise on the Minnesota Constitution.⁵⁴ Similar stirrings are being felt across the nation as state speech and religion clauses receive increased attention amid the unsettled First Amendment landscape.⁵⁵ According to Utah Supreme Court Chief Justice Christine M. Durham, “generally, state constitutions currently afford a friendlier venue for litigants in religious liberty cases.”⁵⁶ Retired Oregon Supreme Court Justice Hans A. Linde urges practitioners and judges to heed *Hershberger* and the primacy of state constitutional law: “the Minnesota story repeated what often happens when state courts have decided federal issues ahead of state issues: delay, needless costs, and often Supreme Court pronouncements that prove to have been unnecessary.”⁵⁷

52. *State v. Linares*, 655 A.2d 737, 753-54 (Conn. 1995); *Price v. State*, 622 N.E.2d 954, 956-57, 961, 964-65 (Ind. 1993); *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1281 (N.Y. 1991), *cert. denied*, 500 U.S. 954 (1991); *Moser v. Frohnmayer*, 845 P.2d 1284, 1285, 1287-88 (Or. 1993); *Ex parte Tucci*, 859 S.W.2d 1, 8 (Tex. 1993).

53. *State v. Wicklund*, 589 N.W.2d 793, 799, 801 (Minn. 1999); *Minn. League of Credit Unions v. Minn. Dep’t of Commerce*, 486 N.W.2d 399, 403-04 (Minn. 1992); *State v. Davidson*, 481 N.W.2d 51, 57 (Minn. 1992); *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992).

54. Jack Nordby, *Foreword* to MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at xviii.

55. Stanley H. Friedelbaum, *Expressive Liberties in the State Courts: Their Permissible Reach and Sanctioned Restraints*, 67 ALB. L. REV. 655, 688 (2004) (observing that while state constitutional contributions to freedom of speech issues “remain marginal in comparison to the multitude of First Amendment precedents,” they are a “welcome development” and “contribute, however sparingly, to the overall body of expressive liberties”); Stanley H. Friedelbaum, *Free Exercise in the States: Belief, Conduct, and Judicial Benchmarks*, 63 ALB. L. REV. 1059, 1059 (2000) (observing that state constitutions’ religious clauses “merit[] attention” given “the unsettled state of the guidelines that have marked the religion clauses of the [federal] Bill of Rights”).

56. Durham, *supra* note 17, at 370.

57. Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 218 (1992).

B. State Action

By its “make no law” language, the First Amendment is triggered only by state action—when a government actor has infringed a person’s religious or speech liberties.⁵⁸ Similarly, by its prohibition against “public money or property” going toward religious schools, article XIII, section 2 of the Minnesota Constitution plainly requires state action.⁵⁹ But by its plain language, article I, section 3 does not require state action.⁶⁰ And apart from article I, section 16’s prohibition against “preference . . . given by law to any religious establishment or mode of worship,” the freedom of conscience clause also contains no state action requirement.⁶¹ Presumably, *anyone* who infringes a Minnesotan’s right to speak, write, publish, worship, or believe may be said to have violated the state constitution.

As applied by the Minnesota Supreme Court, however, the speech and religion clauses both require state action. In *Hill-Murray Federation of Teachers v. Hill-Murray High School*, a 1992 case that built on the strict scrutiny rule in *Hershberger*, the supreme court held that the relevant inquiry was whether a “state regulation” burdened religious exercise.⁶² In *State v. Wicklund*, the court’s most recent decision interpreting article I, section 3, it was observed that the state constitution “does not accord affirmative rights to citizens against each other; its provisions are triggered only by state action.”⁶³

At issue in *Wicklund* was whether state constitutional rights of fur protesters (and accused criminal trespassers) were violated when they were denied access to the privately owned but publicly

58. U.S. CONST. amend. I; *see, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (finding state action in state court’s application of state law to a civil action between private parties).

59. MINN. CONST. art. XIII, § 2.

60. *Id.* art. I, § 3.

61. *Id.* art. I, § 16.

62. 487 N.W.2d 857, 865 (Minn. 1992).

63. 589 N.W.2d 793, 801 (Minn. 1999) (directing courts to gauge “whether the state regulation burdens the exercise of religious beliefs”). When private action is at issue, state action under the Minnesota Constitution may be “found only where there is either a symbiotic relationship or a sufficiently close nexus between the government and the private entity so that the ‘power, property and prestige’ of the state has been in fact placed behind the challenged conduct.” *Id.* at 802 (citing *Brennan v. Minneapolis Soc’y for the Blind, Inc.*, 282 N.W.2d 515, 528 (Minn. 1979)).

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financed Mall of America.⁶⁴ At the time, courts in California, New Jersey, Washington, Pennsylvania, Connecticut, and Colorado had used state constitutions to ensure speakers' access to private shopping malls, amid the United States Supreme Court's acquiescence.⁶⁵ However, most courts confronting such claims had sided with the mall owners.⁶⁶ The Minnesota Supreme Court distinguished the Colorado decision as one involving activities "far more of a governmental nature" than the Mall of America case because government agencies had maintained offices in the Colorado mall, and police officers patrolled there during business hours.⁶⁷ Accordingly, it appears uncertain whether the Minnesota Supreme Court would deviate from requiring state action for article I, section 3 claims. But it is worth noting that the Mall of America is now patrolled by municipal police officers and contains a publicly funded light-rail station.⁶⁸

The court in *Wicklund* did not mention that Wisconsin had struggled with the identical issue twelve years earlier. In *Jacobs v. Major*, a mall-access case in which dancers sought to depict nuclear warfare, a majority of the Wisconsin Supreme Court agreed that the state's free-speech provision, which is nearly identical to Minnesota's, is triggered only by state action.⁶⁹ But three dissenting justices argued that the speech provision's plain language does not require state action and astutely observed that the section immediately preceding it—which, as in Minnesota, forbids slavery and involuntary servitude with no mention of state action—would

64. *Id.* at 794-95, 803.

65. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991); *Cologne v. Westfarms Ass'n*, 442 A.2d 461, 483 (Conn. Super. Ct. 1982); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 771 (N.J. 1994); *State v. Schmid*, 423 A.2d 615, 630 (N.J. 1980); *Commonwealth v. Tate*, 432 A.2d 1382, 1390 (Pa. 1981); *Alderwood Assoc. v. Wash. Envtl. Council*, 635 P.2d 108, 115-16 (Wash. 1981); *see also* Devlin, *supra* note 10, at 902 n.9; Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 188 (1980) (arguing that state constitutions provide right of access to privately held public forums for expressive activity).

66. Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 32 (1999).

67. *Wicklund*, 589 N.W.2d at 802 n.8 (analyzing *Bock*, 819 P.2d 55).

68. *See* Mall of America: Guest Services, http://www.mallofamerica.com/about_moa_guest_services.aspx (last visited Nov. 5, 2005); *see also* Alexander, *supra* note 66, at 1 (observing that malls represent "the downtown of yesteryear," but that expression is controlled).

69. *Jacobs v. Major*, 407 N.W.2d 832, 846 (Wis. 1987).

be enforced irrespective of who is the actor.⁷⁰

Commentator John Devlin has proposed a framework apart from state action for imposing state constitutional speech limitations on corporations, associations, and similar entities “where the text and history of a particular constitutional provision fail to show that it was intended to bind only the state government.”⁷¹ Devlin suggests imposing liability when (1) the alleged infringer was not an individual “acting within a sphere of personal autonomy,” (2) a “significant right” is at issue, and (3) competing interests are balanced.⁷² Perhaps such a framework will take root if governments continue balancing financial incentives for traditionally public spaces to become privately controlled.

C. *Gauging Framers’ Intent*

Examining the United States Constitution to reflect “the public intentions of those who drafted and ratified it” is attractive to some and unworkable to others.⁷³ As Cass R. Sunstein observed recently: “[w]hy should we be governed by people long dead?”⁷⁴ Gauging framers’ intent as to the Minnesota Constitution borders on futile.⁷⁵ Well-documented is the chaos in 1857 when Democrats and Republicans held separate constitutional conventions that produced two documents, which were resolved by a conference committee that left little paper trail.⁷⁶ Given that the Minnesota

70. *Id.* at 852 (Abrahamson and Bablitch, JJ., and Heffernan, C.J., dissenting).

71. Devlin, *supra* note 10, at 825.

72. *Id.* at 901.

73. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1, 10 (2002). “After thorough and careful historical research, scholars disagree on the original meaning of almost every important constitutional provision.” *Id.* at 14.

74. Cass R. Sunstein, *Fighting for the Supreme Court: How Right-Wing Judges Are Transforming the Constitution*, HARPER’S MAGAZINE, Sept. 2005, at 31, 37.

75. *But see* MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 14 (asserting that “drafters’ intent is key to [Minnesota] constitutional interpretation”).

Minnesota courts are receptive to constitutional interpretations using history of the constitutional text, including drafters’ views of that text, views of past legislatures as reflected in earlier statutes, and views of the courts not only to that provision but also as to related federal provisions when those views fairly clearly result from state reasoning rather than federal mandates.

Id. at 15.

76. WILLIAM ANDERSON, A HISTORY OF THE CONSTITUTION OF MINNESOTA 79-82, 98 (1921); MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 1; *see also* Douglas A. Hedin, *The Quicksands of Originalism: Interpreting Minnesota’s*

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Constitution was restructured in 1974, today's commentators do not even agree on how many constitutions Minnesota had, let alone how to decipher original meaning.⁷⁷ Nevertheless, the state's courts occasionally decide state constitutional issues on "framers' intent."⁷⁸ In so doing, the courts risk ignoring that the Minnesota Bill of Rights applied to state residents well before most of the federal Bill of Rights did, and that state constitutional clauses influenced creation of the First Amendment.⁷⁹

A postmortem of *State v. Wicklund* helps demonstrate why "framers' intent" is a red herring. The case began in Hennepin County District Court, where none other than Judge Nordby denied the alleged protesters' motion to dismiss but nevertheless issued a memorandum observing that the publicly financed Mall of America was bound to respect free-speech rights under article I, section 3.⁸⁰ Judge Nordby explained that the plain language of article I, section 3 "affirmatively grants plenary rights" while the First Amendment does not, and he posited that the Minnesota Constitution's framers were "intimately familiar" with the federal speech clause and found its plain-language limitation to Congressional actions "wanting."⁸¹

In holding that article I, section 3 does not apply to expressive conduct at the privately owned mall, the Minnesota Court of Appeals observed that Judge Nordby had failed to delineate "the

Constitutional Past, 30 WM. MITCHELL L. REV. 241, 243-44 (2003) (doubting that originalism has a place in Minnesota constitutional analysis given the "dysfunctional" constitutional convention in 1857); Russell Pannier, Essay, Abraham's *Theory of Constitutional Interpretation*, 29 WM. MITCHELL L. REV. 265, 293 (2002) (criticizing Minnesota Supreme Court for mixing originalism with nonoriginalism); Simonett, *supra* note 9, at 239 (characterizing originalism as "not a particularly helpful approach" to the Minnesota Constitution).

77. See *Comments on the Restructured Constitution of 1974*, in 1 MINN. STAT. ANN. 129 (West 1976) (explaining that restructuring was not a "revision"); compare MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 1, 12 (Minnesota has one constitution continuously in effect since 1857 and is among the nation's oldest), with Nordby, *Foreword* to MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at xvii (Minnesota has two constitutions), and Morrison, *Introduction to the Minnesota Constitution*, *supra* note 7, at 287 ("Minnesota has three state constitutions.") (emphasis added).

78. See, e.g., *Winters v. Kiffmeyer*, 650 N.W.2d 167, 173 (Minn. 2002) (assessing what "framers" intended by judicial-appointment provision in state constitution).

79. Durham, *supra* note 17, at 354.

80. *State v. Wicklund*, Nos. 96-042987, 96-044022, 96-043061, 96-043228, 1997 WL 426209, at *25 (Hennepin County Dist. Ct. July 24, 1997).

81. *Id.* at *7.

[state constitution] framers' reason for departing from the language of the First Amendment of the U.S. Constitution."⁸² And in affirming the court of appeals, the Minnesota Supreme Court identified its "first consideration" as being "whether the significant difference in terminology between the federal and state free speech provisions suggests that the framers of the Minnesota Constitution intended the free speech protection to be more broadly applied than its federal counterpart."⁸³

The appellate courts' approaches can be criticized. First, the courts did not follow precedent suggesting that article I, section 3's plain language be examined before history.⁸⁴ Second, the First Amendment's speech clause was not made applicable to the states until 1925 or later, decades after article I, section 3 was adopted.⁸⁵ As Judge Nordby observed in his memorandum on remand, the issue was not why article I, section 3 should be read differently than the First Amendment, but "why it should be read the same."⁸⁶

The original intent behind article I, section 16 might be easier to gauge, given that the Minnesota Constitution's Preamble expresses "grateful[ness] to God for our civil and religious

82. *State v. Wicklund*, 576 N.W.2d 753, 756 (Minn. Ct. App. 1998), *aff'd*, 589 N.W.2d 793 (Minn. 1999).

83. *State v. Wicklund*, 589 N.W.2d at 798-99.

84. *See State v. Davidson*, 481 N.W.2d 51, 57 (Minn. 1992) (holding that article I, section 3 case can be resolved "in the plain language of the constitution"); *see also Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 311 (Minn. 2000) (Anderson, Paul H., J., dissenting) (observing that the "majority's analysis ignores the constitution's plain language").

85. *See* sources cited *supra* note 6. In *Wicklund*, the Minnesota Supreme Court's "brief historical journey" revealed that the "framers" were concerned with libel suits, not with protest speech, and that article I, section 3 was "copied from elsewhere"—facts that, according to the court, compelled the conclusion that article I, section 3 was to be read no more broadly than the First Amendment. 589 N.W.2d at 799. The court of appeals similarly criticized the district court for failing to identify "the framers' reason for departing from the language of the First Amendment of the U.S. Constitution." 576 N.W.2d at 756.

86. *State v. Wicklund*, Nos. 96-042987, 96-044022, 96-043061, 96-043228, 1997 WL 426209, at *10 (Hennepin County Dist. Ct. Jan. 10, 2000). In his twenty-six-page memorandum, Judge Nordby also observed that the State had improperly appealed from a ruling in which it had prevailed on the defendants' motion to dismiss, and he characterized his constitutional observations as "unimportant dictum [that] has now been transformed into law." *Id.* at *1, *3. "The Supreme Court's opinion betrays a lack of interest in, knowledge of, and respect for the Minnesota Constitution." *Id.* at *13. Ultimately, in a bench trial, Judge Nordby found the protesters not guilty because the State had not proven criminal intent. *See id.* at *22-26.

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liberty”⁸⁷ In addition, the Northwest Ordinance of 1787, which applied to Minnesota before statehood, directs that Minnesota’s future laws be based on “civil and religious liberty,” that no one should be “molested on account of his mode of worship or religious sentiments[,]” and that “[r]eligion, morality, and knowledge . . . shall be forever encouraged.”⁸⁸ Still, determining whether the “framers” intended for article I, section 16 to be stronger than the First Amendment is imprudent because “the free exercise clause at the federal level was itself modeled on free exercise provisions in the various state constitutions.”⁸⁹

Oregon’s Justice Linde observes that because state constitutions have much in common with common law, originalism should yield to a more “institutional” approach that “derives constitutional law from the practice of judicial review rather than judicial review from constitutional law.”⁹⁰ “Fidelity to a constitution need not mean narrow literalism. Most state bills of rights leave adequate room for modern applications, as well as for comparing similar guarantees elsewhere.”⁹¹ But even under such an approach, state courts are likely to continue importing federal standards for their state constitutional analyses.⁹²

Minnesota courts must not ignore the “clear meaning” of the state constitution’s religion and speech clauses,⁹³ but must confront

87. *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990) (citing Preamble as among history that “supports a broad protection for religious freedom in Minnesota”).

88. ANDERSON, *supra* note 76, at 9; NORTHWEST ORD. §§ 13, 14, arts. 1-2, available at <http://www.yale.edu/lawweb/avalon/nworder.htm>. But relying on the Northwest Ordinance too much for today’s interpretations might be unwise, given that the document based legislative representation on the number of “free male inhabitants” in a district. NORTHWEST ORD. § 9.

89. McConnell, *supra* note 16, at 1485. “[S]tate constitutions provide the most direct evidence of the original understanding [of freedom of religion], for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term ‘free exercise of religion’ meant what it had meant in their states.” *Id.* at 1456.

90. Linde, *supra* note 57, at 226-28.

91. *Id.* at 228.

92. *See, e.g., Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998); *see also infra* notes 123-125 and accompanying text.

93. *See Jacobs v. Major*, 407 N.W.2d 832, 843-44 (Wis. 1987) (observing, in a case involving the Wisconsin Constitution’s speech clause, that the court “has the power, perhaps the duty, to make sure that the protections of our state constitution remain relevant in light of changing conditions, emerging needs and acceptable changes in social values, but such action must be consistent with the clear meaning of the constitution”).

the language with analyses relevant to today's society without rigid adherence to original intent. On this point, *State v. Hamm*⁹⁴ is instructive. In that case, the Minnesota Supreme Court determined that "framers" of the Minnesota Constitution intended for a criminal defendant to be afforded a twelve-person jury, but conceded that "[w]e would no longer interpret the word 'men,' for example, to apply only to free white men, despite the framers' intent."⁹⁵

III. ESTABLISHMENT OF RELIGION

A. *Commandments and Crèches*

The First Amendment's Establishment Clause commands that "Congress shall make no law respecting an establishment of religion."⁹⁶ When first made applicable to the states in *Everson v. Board of Education*, the Supreme Court observed that the "First Amendment has erected a wall between church and state."⁹⁷ The Clause's "clearest command"—as articulated in *Larson v. Valente*, where the Court invalidated a Minnesota law that distinguished religions that receive half their contributions from nonmembers—is that "one religious denomination cannot be officially preferred over another."⁹⁸

But the wall between church and state is hardly impregnable, and Establishment Clause jurisprudence is, in Justice Thomas's estimation, "in hopeless disarray."⁹⁹ Several constitutional tests have emerged, sometimes producing results bordering on the absurd: a government-sponsored holiday display that includes baby Jesus is okay, but only if room is left for reindeer, clowns, and elephants.¹⁰⁰ In 2005, the Supreme Court obscured the analysis even more by issuing fact-specific, conflicting holdings on how and

94. 423 N.W.2d 379 (Minn. 1988).

95. *Id.* at 385-86 (examining article 1, section 6 of the Minnesota Constitution (amended 1988)).

96. U.S. CONST. amend. I.

97. 330 U.S. 1, 18 (1947).

98. 456 U.S. 228, 244 (1982).

99. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 n.1 (2004) (Thomas, J., concurring) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring)).

100. See *Allegheny County v. Am. Civil Liberties Union*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 671, 685 (1984).

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where a county is permitted to display the Ten Commandments in courthouses.¹⁰¹

Apart from school-funding issues,¹⁰² the Minnesota Supreme Court has had little opportunity to remedy the disarray with the state constitution. Cases interpreting article I, section 16 are of little precedential value. In an 1898 opinion by Justice William Mitchell, the court upheld a no work-on-Sundays law as consistent with the state's police power to enact a "sanitary measure."¹⁰³ In its 1927 opinion in *Kaplan v. Independent School District of Virginia*, the court held that it would be a "strained construction" to interpret article I, section 16 as prohibiting daily Bible readings in public school.¹⁰⁴ In an unpublished decision from 1997, the Minnesota Court of Appeals invoked federal precedent to hold that a Minnesota statute criminalizing car sales on Sundays does not constitute impermissible establishment of religion under article I, section 16.¹⁰⁵ In 2004, the Minnesota Supreme Court avoided the state constitutional establishment issue while examining a rule requiring Minnesota attorneys to attend "elimination of bias" seminars including panels such as "Understanding Islam and Working with Muslim Clients" and "Enhancing Your Knowledge of Somali and Islamic Cultures."¹⁰⁶

101. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (maintaining Ten Commandments monument outside courthouse permissible); *McCreary County v. Am. Civil Liberties Union*, 125 S. Ct. 2722 (2005) (posting Ten Commandments inside courthouse impermissible).

102. See discussion *infra* Part III.B.

103. *State v. Petit*, 77 N.W. 225, 226, 74 Minn. 376, 379 (1898), *aff'd*, 177 U.S. 164 (1900).

104. 214 N.W. 18, 20, 171 Minn. 142, 148 (1927). "What more natural than turning to that Book for moral precepts which for ages has been regarded by the majority of the peoples of the most civilized nations as the fountain of moral teachings?" *Id.* at 18, 171 Minn. at 144. *Kaplan* remains good law but never has been cited as persuasive authority. See Michael K. Steenson, Essay, *Pledging Allegiance*, 29 WM. MITCHELL L. REV. 747, 772, 775 (2003) (characterizing *Kaplan* as "simply of historical interest" and not a "standard for current cases").

105. *Kirt v. Humphrey*, No. C1-96-2614, 1997 WL 561249, at *5 (Minn. Ct. App. Sept. 9, 1997) (upholding section 168.275 of Minnesota Statutes under *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *McGowan v. Maryland*, 366 U.S. 420 (1961)). "Although the genesis of Sunday closing laws was religious, over time such laws have evolved into secular laws devoid of their once religious bases." *Id.*

106. *In re Rothenberg*, 676 N.W.2d 283, 292 (Minn. 2004). The court held that the requirement survived First Amendment Establishment Clause scrutiny, and then characterized the article I, section 16 inquiry as involving only an ungrounded claim involving free exercise of religion, making no mention of article I, section 16's prohibition against preference for religious establishment. *Id.* at 293-94.

The slate is blank in Minnesota as to whether placing the Ten Commandments or similar religious symbols on public property violates the state constitution. This is not so in several other states.¹⁰⁷ California and Colorado have invoked their state constitutions to forbid religious displays from public property,¹⁰⁸ while Florida, Louisiana, and Oklahoma have held to the contrary.¹⁰⁹ The Oregon Supreme Court undertook a rather tortured inquiry in 1969 and 1976 before essentially holding that the question is best resolved under the First Amendment and not the state constitution.¹¹⁰ In interpreting language nearly identical to article I, section 16's prohibition against "any preference . . . to any religious establishment or mode of worship," a divided Wisconsin Supreme Court held that a city's annual Christmas display was permissible because "[t]he display is not a place of worship, it is not a 'ministry,' [and] no 'preference' is given to 'any religious establishments' or modes of worship[.]"¹¹¹

With the First Amendment's establishment clause on unsure

107. See generally Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985) (surveying litigation involving state constitution establishment clauses).

108. Fox v. City of L.A., 587 P.2d 663, 663-65 (Cal. 1978) (holding that "huge cross" illuminated on city hall during Christmas and Easter violated state constitutional provision forbidding laws "respecting an establishment of religion"); Conrad v. City & County of Denver, 656 P.2d 662, 666, 671, 675 (Colo. 1983) (holding that plaintiffs had established prima facie case that city-sponsored crèche violated state constitution).

109. Paul v. Dade County, 202 So. 2d 833, 834-35 (Fla. Dist. Ct. App. 1967), *rev. denied*, 207 So. 2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968) (rejecting non-Christian taxpayer's claim that state constitution forbade cross on county courthouse, and resolving case under First Amendment); State v. Morrison, 57 So. 2d 238, 240-47 (La. Ct. App. 1952) (holding that state constitution permits religious statue on public property, and observing that there was no federal question); Meyer v. Oklahoma City, 496 P.2d 789, 792-93 (Okla. 1972) (holding that a fifty-foot cross on city fairgrounds did not go toward "use, benefit or support" of religious institution).

110. Lowe v. City of Eugene, 451 P.2d 117, 122 (Or. 1969) (holding that cross on city land was permissible under state and federal constitutions), *argued on reh'g, withdrawn*, 459 P.2d 222, 224 (Or. 1969). After the city's voters accepted the cross as part of a war memorial, the Oregon Supreme Court held that "changed circumstances" and newly enacted federal precedent necessitated that the cross be allowed, apparently under the First Amendment. Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 340, 342, 346 (Or. 1976).

111. King v. Vill. of Waunakee, 517 N.W.2d 671, 683 (Wis. 1994). Two dissenting justices wrote that religious rights would be "enhanced, not diminished" by holding the city's display improper under the state constitution. *Id.* at 688 (Heffernan, C.J., and Abrahamson, J., dissenting).

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footing, litigants may be emboldened to revisit article I, section 16's prohibition against religious establishment.¹¹² Given the dearth of state constitutional law on article I, section 16's establishment clause, state courts are apt to use First Amendment precedent as a starting point.¹¹³ But they should not ignore cases from other courts that have interpreted language substantially similar or identical to Minnesota's establishment clause. For cases that fail to reach outside Minnesota's borders—as would be the situation in most if not all establishment-of-religion situations—it seems appropriate for Minnesota courts to develop state constitutional case law that respects the rights of religious establishments but also the desires of Minnesotans who wish not to support such establishments.

B. Religion, Schools, and Taxes

The Minnesota Supreme Court has not been idle in interpreting article XIII, section 2, which prohibits public money from being used to benefit religious-school education. Two cases from the 1970s suggest that courts should parse the constitutional language closely to ensure that the state's interest in education is not trumped by “incidental” benefits to religious schools.

In *Minnesota Higher Education Facility Authority v. Hawk*, the court upheld public refinancing of debts that three private colleges with religious ties had incurred, observing that there was no expenditure of “public money” within article XIII, section 2.¹¹⁴ In *Americans United Incorporated as Protestants and Other Americans United*

112. See Wendtland, *supra* note 107, at 653 (concluding that Supreme Court's “shift from strong disapproval of church-state entanglement to a relative accommodation has left considerable room for the states to maintain a wall of separation through their own constitutions”).

113. See *id.* (“[S]tate courts consult federal [Establishment Clause] precedent while creating independent tests that promote particular state constitutional values.”).

114. 232 N.W.2d 106, 112, 305 Minn. 97, 107 (1975). The court noted that among the three colleges, only Bethel College was owned and operated by a church body (the Baptist General Conference) and that the only religious ties to the other institutions, St. Mary's College and the College of St. Theresa, involved requirements that one-third of the colleges' boards of trustees be from certain religious orders. *Id.* at 108 nn. 9-11, 305 Minn. at 100 nn. 9-11. Refinancing was described as aid of a “very special sort” that resulted in no “financial burden” to the state and “no grant or appropriation of public money nor a loan of public credit. *Id.* at 111-12, 305 Minn. at 105-06 (citing *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973); *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974); *Opinion of the Justices*, 236 N.E.2d 523, 527 (Mass. 1968)).

for *Separation of Church and State v. Independent School District No. 622*, the court held that using public money to transport children to sectarian schools was on “the verge of unconstitutionality,” but was permissible because busing does not “directly involve *support* of the educational process” within article XIII, section 2’s prohibition against “support” for religious schools.¹¹⁵ The court held that public busing “serves a legitimate secular purpose in promoting the safety and welfare of children required to attend school under our compulsory attendance law,” and that any benefits to religion were “purely incidental and inconsequential.”¹¹⁶

In 1993, the Minnesota Court of Appeals interpreted *Americans United* as permitting “indirect and incidental” benefits to religious schools, holding that a church-affiliated college could be reimbursed from public funds for courses that high school students took as part of the Post-Secondary Enrollment Options Act.¹¹⁷ Four years later, the Eighth Circuit Court of Appeals relied on *Americans United* and the state court of appeals case to decide as a “matter of law” that an arrangement between a school district and a member of a religious order did not violate article I, section 16 or article XIII, section 2.¹¹⁸ The church member had purchased a school building and sought to have a school district “lease space” there and operate a public school, on condition that the school district provide a teacher and, in accordance with the religious order’s teachings, not use electronics, including computers. A divided Eighth Circuit held that the arrangement did not violate the First Amendment’s Establishment Clause, and then affirmed constitutionality under the state constitution.¹¹⁹ The Eighth Circuit observed that although the “[Minnesota] establishment clauses prohibit both ‘benefits’ and ‘support’ to schools teaching distinctive religious doctrines,” the arrangement was proper

115. 179 N.W.2d 146, 155-56, 288 Minn. 196, 213-15 (1970). At the time, the relevant state constitutional language was numbered as article VIII, section 2.

116. *Id.* at 156, 288 Minn. at 214.

117. *Minn. Fed’n of Teachers v. Mammenga*, 500 N.W.2d 136, 138-39 (Minn. Ct. App. 1993) (examining constitutionality of section 123.3514 of Minnesota Statutes (1990)).

118. *Stark v. Indep. Sch. Dist. No. 640*, 123 F.3d 1068, 1077 (8th Cir. 1997). The federal appeals court found authority for ruling on the state constitutional claim in *Hutchins v. Champion Int’l Corp.*, 110 F.3d 1341, 1345 (8th Cir. 1997) (citing *Talley v. U.S. Postal Serv.*, 720 F.2d 505, 508 (8th Cir. 1983)). *Cf.* *Minn. Term Limits Coal. v. Keefe*, 535 N.W.2d 306, 307 (Minn. 1995) (federal district court certified state constitutional question to Minnesota Supreme Court).

119. *Stark*, 123 F.3d at 1077.

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because no religious instruction took place at the school “and there is no expenditure of public funds in support of the teaching or promulgating of religious beliefs.”¹²⁰

These cases strongly suggest that courts weighing state establishment-of-religion claims will strive to not hinder education. But a fifty-year-old case warns schools not to be lackadaisical. In *Independent School District No. 6 v. Johnson*, the Minnesota Supreme Court found a “probable” violation of the article XIII, section 2 language when the school failed to remove crucifixes, religious pictures, and holy water fonts from leased school space, but held that withholding state funding was improper because the State had failed to follow procedures for doing so.¹²¹

The constitutionality of providing tax credits or deductions for parents who choose private education for their minor children—to the indirect benefit of parochial schools—is unresolved under article I, section 16 or article XIII, section 2.¹²² This is not so in Wisconsin, where the state supreme court examined language substantially similar to article I, section 16 in upholding a state law permitting some Milwaukee children to attend any private school at public expense.¹²³ In holding that the law did not violate the state constitutional provision that prohibits public funds from being used “for the benefit of” religious societies or seminaries, the court distinguished precedent from 1962 that the state constitution provided a “stricter standard” than the First Amendment, determined that “well reasoned” federal cases controlled the state constitutional inquiry, and concluded that the state law’s “primary effect” was not to advance religion.¹²⁴ The court then used only state precedent to further conclude that the law did not violate the state constitutional provision against “compelled” attendance at

120. *Id.*

121. 65 N.W.2d 668, 669, 673-74, 242 Minn. 539, 540-41, 547-48 (1954).

122. In *Minnesota Civil Liberties Union v. State*, the Minnesota Supreme Court held that a statute providing tax credits for Minnesota parents who send their children to “nonpublic schools” violated the Establishment Clause, and further held that it “need not consider questions raised under the Minnesota Constitution[.]” 224 N.W.2d 344, 353, 302 Minn. 216, 233 (1974). Then the United States Supreme Court held in *Mueller v. Allen* that a Minnesota law permitting parents to deduct elementary and secondary education expenses, including those paid to parochial schools, did not offend the Establishment Clause because the benefit was available to all parents. 463 U.S. 388, 388, 397 (1983).

123. *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998).

124. *Id.* at 620-22 (distinguishing *Reynolds v. Nusbaum*, 115 N.W.2d 761 (Wis. 1962)).

places of worship.¹²⁵

IV. FREE EXERCISE OF RELIGION

A. *Standard Develops in Minnesota Supreme Court*

Few tenets are more engrained in the United States than the idea that persons may exercise their religious beliefs as they wish. The ethos often is linked to colonists' desire to escape England's "religious strife and intolerance."¹²⁶ But as Michael McConnell observes, once in America the colonists exercised religiousness in various ways—with intolerant Puritanism, with a desire to govern by using religious principles, with "benign neglect" for established churches and "de facto religious toleration," and with desire to accommodate religious dissenters.¹²⁷ New York, from which Minnesota imported its freedom of conscience provision, subscribed to the "benign neglect" model, "largely due to the extraordinary religious diversity of the area."¹²⁸

As mentioned previously, strict scrutiny remains the standard in Minnesota for determining whether a law burdens free exercise of religion.¹²⁹ Under article I, section 16, after a person proves that a sincerely held religious belief is excessively burdened, the state must prove that the measure is the least restrictive means for serving the overriding or compelling government interest.¹³⁰ The standard most often is associated with *State v. Hershberger*, a case in which Amish buggy drivers sought exemption from a traffic law requiring slow-moving-vehicle signs to be displayed.¹³¹ However, ten weeks before *Hershberger* the Minnesota Supreme Court issued an often-overlooked plurality decision in *State ex rel. Cooper v. French*, which suggests to practitioners that morality sometimes is more important than precedent when state-constitutional standards are developed.¹³² Two years after *Hershberger* and *Cooper* came *Hill-Murray Federation of Teachers v. Hill Murray High School*, which

125. *Id.* at 622-23 (citing *Holt v. Thompson*, 225 N.W.2d 678 (Wis. 1975)).

126. McConnell, *supra* note 16, at 1421.

127. *Id.* at 1422-24.

128. *Id.* at 1424; *see also supra* note 16 and accompanying text.

129. *See supra* notes 43-46 and accompanying text.

130. *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992); *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990).

131. 462 N.W.2d at 395.

132. *See State ex rel. Cooper v. French*, 460 N.W.2d 2, 9-11 (Minn. 1990).

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solidified the strict scrutiny rule and provided clear guidance on how to maintain or defend against a free-exercise case under the state constitution.¹³³

1. State *ex rel.* Cooper v. French

In *State ex rel. Cooper v. French*, a landlord argued that his religious rights would be violated if he was forced under the Minnesota Human Rights Act to rent an apartment to an unmarried woman likely to cohabit with her fiancé.¹³⁴ A four-justice majority of the Minnesota Supreme Court agreed with the landlord, reasoning that the legislature did not intend for the Human Rights Act to protect “unmarried, cohabitating couples in housing cases,” particularly amid the state’s “longstanding” distaste for fornication.¹³⁵

Three of the four justices then decided that article I, section 16 “commands this court to weigh the competing interests at stake whenever rights of conscience are burdened”¹³⁶—an inquiry that Justice John E. Simonett considered unnecessary given the case’s disposition on statutory grounds.¹³⁷ The plurality concluded that article I, section 16 prevented the marriage-based Human Rights Act provision from being applied to landlord French.¹³⁸ Without citing supporting authority, the plurality observed that article I, section 16 “grants far more protection of religious freedom than the broad language of the United States Constitution.”¹³⁹ The plurality proposed a strict scrutiny test for laws that burden religion and concluded that the State had failed to prove that ensuring housing for unmarried women likely to have sex with a significant

133. 487 N.W.2d at 864-67.

134. 460 N.W.2d at 4 (referencing section 363.03, subdivision 2(1)(a) of Minnesota Statutes (1986)). Landlord French was renting out a two-bedroom house, which apparently had served as his homestead, until he could sell it. *Id.* at 3.

135. *Id.* at 5, 7 (apparently referencing section 609.34 of Minnesota Statutes, still in effect today, which criminalizes sexual intercourse between “any man” and a “single woman”). The court observed: “How can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it? . . . Rather than grant French an exemption from the MHRA, the state would rather grant everyone an exemption from the fornication statute. Such a result is absurd.” *Id.* at 10.

136. *Id.* at 9.

137. *Id.* at 11.

138. *Id.*

139. *Id.* at 9.

other was a “sufficiently compelling interest.”¹⁴⁰

Chief Justice Peter S. Popovich dissented, joined by Justices Rosalie E. Wahl and Alexander M. (Sandy) Keith. Chief Justice Popovich contended the case was controlled by *State ex rel. McClure v. Sports and Health Club, Inc.*, where in 1985 the court had applied both the First Amendment and article I, section 16 to hold that health-club operators who sought to employ only fundamentalist Christians violated the Human Rights Act.¹⁴¹ He argued against ignoring the First Amendment and observed, “the majority’s attempt to interpret the Minnesota Constitution’s Freedom of Conscience provision more broadly is not supported by a single decision of this court.”¹⁴²

2. State v. Hershberger

Seventy days after deciding *French*, the court issued its landmark *Hershberger* opinion. Again, the case’s evolution provides valuable insight into how state constitutional cases can develop. Initially, the court had exempted the Amish buggy drivers from the state traffic law solely under the First Amendment’s then-valid strict scrutiny test, saving article I, section 16 analysis “for another day.”¹⁴³ Then the United States Supreme Court remanded *Hershberger* in light of *Employment Division v. Smith*, which, as discussed above, largely eviscerated the strict scrutiny standard.¹⁴⁴

On remand, the Minnesota Supreme Court correctly observed that *Smith* had “significantly changed first amendment free exercise analysis” and then examined the Amish’s case under article I, section 16.¹⁴⁵ The court held that the buggy drivers already had proven that their beliefs were sincere under the recently overruled *Sherbert* test.¹⁴⁶ The question was whether the State had demonstrated “that public safety cannot be achieved through reasonable alternative means” other than requiring slow-moving-

140. *Id.* at 10.

141. *Id.* at 14-15, 21 (referencing *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985)).

142. *Id.* at 14.

143. *State v. Hershberger*, 444 N.W.2d 282, 283 (Minn. 1989).

144. *Minnesota v. Hershberger*, 495 U.S. 901 (1990) (vacating *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989)); *see also supra* notes 43-45 and accompanying text.

145. *State v. Hershberger*, 462 N.W.2d 393, 396-99 (Minn. 1990).

146. *Id.* at 396; *see also Sherbert v. Verner*, 374 U.S. 398, 405-06 (1963) (requiring plaintiff to prove “substantial” burden).

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vehicle signs.¹⁴⁷ The court concluded that because lanterns and reflective tape would adequately protect Amish buggies, the State had not met its burden under article I, section 16, and for the first time a majority of the Minnesota Supreme Court departed from the First Amendment to decide a free exercise claim solely under the Minnesota Constitution.¹⁴⁸

The author was none other than Chief Justice Popovich, who just ten weeks earlier had criticized the *French* plurality for citing no precedent while ignoring the First Amendment. In *Hershberger*, Popovich cited the 1984 article that Judge Nordby co-authored, the *French* plurality's opinion, and *Sports & Health Club* to hold that under article I, section 16, the State bears the burden of proving that it is employing the least restrictive means to fulfill a compelling interest.¹⁴⁹

3. Hill-Murray

In *Hill-Murray Federation of Teachers v. Hill-Murray High School* the issue was whether the Minnesota Labor Relations Act could be applied to a Catholic high school where lay employees sought union representation.¹⁵⁰ The court again disavowed the United States Supreme Court's "limited analysis" on free exercise claims and declared that Minnesota courts shall "retain the compelling state interest balancing test."¹⁵¹ Article I, section 16 was said to have four prongs: "whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means."¹⁵²

The court had little trouble finding a sincerely held belief, and under the third prong found an overriding and compelling state interest in maintaining peace during labor relations.¹⁵³ As for the second prong, the court acknowledged that the school had shown that the law interfered "with their authority as an employer," but

147. *Hershberger*, 462 N.W.2d at 399.

148. *Id.*

149. *Id.* at 397-99.

150. *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992).

151. *Id.* at 865.

152. *Id.*

153. *Id.* at 865, 867.

faulted the school for not demonstrating that “this minimal interference *excessively* burdens their religious beliefs.”¹⁵⁴ Under the fourth prong, the court held that the school’s proffered voluntary grievance procedure, while a less-restrictive means, was inadequate because it was “just that—voluntary.”¹⁵⁵ Therefore, balancing all four prongs, the court determined that applying the Labor Relations Act to the Catholic high school did not offend article I, section 16.

B. Standard Applied in Minnesota Court of Appeals

Because it has confronted all four prongs of the *Hershberger-Hill-Murray* test, the Minnesota Court of Appeals has provided practitioners and district courts with pragmatic, facts-specific guidance on how state free-exercise claims should be addressed. Further guidance is likely as Minnesota courts adjudicate whether the Minnesota Citizens’ Personal Protection Act—the so-called “conceal and carry” law that prevents employers, including churches, from banning firearms from their parking lots—is constitutional.¹⁵⁶

As for when a religious belief is sincere, the court of appeals held that conditioning an unapologetic sex offender’s probation on him admitting the crime does not violate article I, section 16 because telling the truth is “more of a pragmatic, cost-benefit principle than anything else.”¹⁵⁷ The court has also held that prohibiting medicinal use of marijuana infringes a “personal” medical need and not a sincerely held religious belief, even though

154. *Id.* at 866 (emphasis added).

155. *Id.* at 867.

156. See *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 597, 600 (Minn. Ct. App. 2005) (holding that the act violated the “single-subject requirement” of article IV, section 17 of the Minnesota Constitution, but declining to review the article I, section 16 claim “on an advisory basis”). The district court had addressed the case’s merits, ruling that the plaintiff churches that seek to exclude firearms from their parking lots had met their burden under article I, section 16, and that the State had failed to identify a compelling interest or to address less-restrictive alternatives. *Unity Church of St. Paul v. State*, No. C9-03-9570, 2004 WL 1630505, at *9-11 (Ramsey County Dist. Ct. July 14, 2004). A similar action is pending in Hennepin County District Court. See *Edina Cmty. Lutheran Church v. State*, 673 N.W.2d 517 (Minn. Ct. App. 2004); *Edina Cmty. Lutheran Church v. State*, No. MC 03-008185, 2004 WL 632766 (Hennepin County Dist. Ct. March 16, 2004); see also Margaret Zack, *Lawsuit Over Conceal-Carry Takes on Guns at Church*, STAR TRIB. (Minneapolis), Aug. 2, 2005, at 1B.

157. *State v. Schwartz*, 598 N.W.2d 7, 9-10 (Minn. Ct. App. 1999).

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the Book of Genesis directs that “God gives us every plant bearing seeds inside itself for our consumption and for our health.”¹⁵⁸ Forbidding a criminal defendant from wearing a cross during trial *might* impinge a sincerely held religious belief, but failing to hold a hearing on the issue does not create an error necessitating a new trial.¹⁵⁹

Twice the court of appeals has held that the Christ’s Household of Faith church requirement that members work full time for the church is a sincerely held religious belief.¹⁶⁰ Requiring a restaurateur to deliver food inside a facility where abortions are performed infringes on the “moral conscience” and therefore impinges on a sincerely held religious belief.¹⁶¹ Mandatory standardized school testing was held to infringe on sincerely held religious views of parents who believe that sending their children to public schools would risk the parents’ “eternal damnation” and sending them to parochial schools would interfere with a “personal relationship” with God.¹⁶²

As for when beliefs are burdened, the Christ’s Household of Faith cases suggest that an individual’s right to believe is superior to a church’s right to maintain an autonomous forum for those beliefs. Both cases involved fathers ordered to pay child support—one through a court order that named the father, the other through mandatory withholding from the Christ’s Household of Faith church, which was the father’s employer.¹⁶³ In the first case, the court held that the *father’s beliefs* were burdened by forcing him to take a job outside the church to pay a child-support obligation, but in the second case the court held that requiring the church to withhold child support from the father’s earnings was permissible because it was indistinguishable from requiring the church to issue tax forms and did not force the church to “change its religious conduct or philosophy.”¹⁶⁴

As for the third prong, the court of appeals has held that

158. State v. Pedersen, 679 N.W.2d 368, 371-72, 377 (Minn. Ct. App. 2004) (quoting *Genesis* 1:11-12, 29; 9:3).

159. State v. Tate, 682 N.W.2d 169, 175 (Minn. Ct. App. 2004).

160. Rooney v. Rooney, 669 N.W.2d 362, 369 (Minn. Ct. App. 2003); Murphy v. Murphy, 574 N.W.2d 77, 81 (Minn. Ct. App. 1998) (noting that appellant had been a church member for two decades, had married in the church, and worked forty hours a week for the church).

161. Rasmussen v. Glass, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993).

162. *In re Welfare of T.K.*, 475 N.W.2d 88, 90, 92 (Minn. Ct. App. 1991).

163. Rooney, 669 N.W.2d at 369; Murphy, 574 N.W.2d at 81.

164. Rooney, 669 N.W.2d at 369-70; Murphy, 574 N.W.2d at 81.

education¹⁶⁵ and ensuring parental child support were compelling government interests,¹⁶⁶ but that enforcing a civil rights ordinance against an anti-abortion restaurateur was not.¹⁶⁷

On the fourth prong—when burdening sincerely held religious beliefs is found to be the least restrictive way to satisfy the government interest—the court of appeals encourages government to at least try some other step before undertaking the potentially infringing activity. In *Rooney v. Rooney*, the child-support withholding case, the court noted that the county's other efforts, including revoking the father's driver's license and garnishing wages of other employers, had failed.¹⁶⁸ However, in *Murphy v. Murphy*, the other child-support case, the court held that it could not determine whether the least-restrictive means were used because the record lacked information on how much work the father could do outside the church without infringing on his religious obligations.¹⁶⁹ Likewise, in the standardized testing case, the court of appeals criticized the district court for removing children from the home before exhausting "additional statutory remedies"¹⁷⁰

C. The Standard Summarized

The Minnesota Supreme Court and Court of Appeals cases suggest that when assessing a law under article I, section 16's four-prong inquiry, a Minnesota court will perform a fact-intensive balancing test and will not rigidly apply standards as to burdens of production and proof. Individuals such as the anti-abortion restaurateur and distinct minority groups such as the Amish seem to be held to something less than the "excessive" burden to beliefs that Hill-Murray High School had to prove. Courts appear less likely to *compel* behavior (i.e., displaying a slow-moving vehicle sign, renting an apartment, delivering food, testing children) than to *prevent* behavior (i.e., using marijuana, displaying a cross during trial). In addition, when a generally applicable law is at issue, individual plaintiffs such as small-business people or fathers curry courts' favor better than groups such as Catholic high schools.

165. *Welfare of T.K.*, 475 N.W.2d at 92.

166. *Rooney*, 669 N.W.2d at 370; *Murphy*, 574 N.W.2d at 81-82.

167. *Rasmussen v. Glass*, 498 N.W.2d 508, 516 (Minn. Ct. App. 1993).

168. 669 N.W.2d at 370-71.

169. 574 N.W.2d at 82.

170. *In re Welfare of T.K.*, 475 N.W.2d at 93.

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And, for good or for bad, it appears that free exercise claims arising under article I, section 16 remain fact-specific and susceptible to moral judgments:¹⁷¹ marijuana, sex before marriage, and abortion are bad; the Amish way of life is admirable; and children and labor relations are more important than “minimal interference” with church doctrine.

D. Jurisdiction and Standing

Minnesota’s appellate courts employ article I, section 16 apart from the substantive free-exercise context to determine whether a court has subject-matter jurisdiction to adjudicate civil actions against churches. Burdens of proof yield to an appellate court’s *de novo* review, consistent with the general rule that subject matter jurisdiction may be challenged at any time and even on the appellate court’s own motion.¹⁷² Accordingly, when a church or church official is a party in a Minnesota state court, litigants should be poised to adjudicate procedural questions involving jurisdiction and standing under article I, section 16.

The leading case is *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, decided in 2002, where a minister, sued after having romantic relations with a parishioner-counselee, contended that enforcing a negligence claim would violate his state constitutional rights.¹⁷³ The Minnesota Supreme Court disagreed, holding that a statute regulating unlicensed mental health professionals merely provided a “floor of acceptable conduct” that fails to burden religious practice, that the State’s interest in protecting against the “frequently vulnerable nature” of counselees was compelling, and

171. As the Minnesota Supreme Court observed in *French*:

There are certain moral values and institutions that have served western civilizations for eons. This generation does not have a monopoly on either knowledge or wisdom. Before abandoning fundamental values and institutions, we must pause and take stock of our present social order: millions of drug abusers; rampant child abuse; a rising underclass without marketable job skills; children roaming the streets; children with only one parent or no parent at all; and children with no one to guide them in developing any set of values. How can we expect anything else when the state contributes, by arguments of this kind, to further erosion of fundamental institutions that have formed the foundation of our civilizations for centuries?

State *ex rel.* Cooper v. French, 460 N.W.2d 2, 10-11 (Minn. 1990).

172. See, e.g., *Ins. Corp. of Ir. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 (1982).

173. 649 N.W.2d 426, 443 (Minn. 2002).

that the statute did not regulate any “spiritual advice or guidance” and therefore was “tailored in a non-restrictive manner.”¹⁷⁴ In a similar case in 2003, the Minnesota Court of Appeals held that article I, section 16 did not deprive a court of subject-matter jurisdiction to determine whether an employment relationship existed between a pastor and his church’s governing body.¹⁷⁵

Three other court of appeals cases from 1995 remain relevant. In *Lundman v. McKown*, which involved the death of a child treated by Christian Science practitioners, the court held that awarding compensatory damages did not violate article I, section 16 because the damages were not a “vehicle for attacking religious belief” and were more effective at furthering the state’s compelling interest in protecting children than measures such as criminally prosecuting Christian Scientist custodial parents.¹⁷⁶ But jurisdiction was denied under article I, section 16 in the other 1995 cases. In *Geraci v. Eckankar*, the court held that adjudicating an employment-termination claim from an Eckankar church employee who became ineligible for church membership “would require a court to question Eckankar’s monitoring of Geraci’s adherence to church doctrine, its reasons for excommunication, and the veracity of Eckankar’s responses.”¹⁷⁷ In *Basich v. Board of Pensions, Evangelical Lutheran Church in America*, the court denied jurisdiction in a breach-of-contract claim from pastors who challenged a pension plan’s divestment from companies doing business in South Africa,

174. *Id.* at 442-43. Subsequently, the Minnesota Court of Appeals held that the Minnesota Constitution did not bar jurisdiction against the Minnesota Conference of Seventh-Day Adventists for negligent employment and vicarious liability. *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 657 N.W.2d 569, 576 (Minn. Ct. App. 2003).

175. *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 262 (Minn. Ct. App. 2003). The court also affirmed jurisdiction for a vicarious liability claim because there was no showing of “how an examination by the court of whether sexual penetration occurred within the scope of employment involves any inquiry into church doctrine or procedure” *Id.* at 264.

176. 530 N.W.2d 807, 818-19 (Minn. Ct. App. 1995), *rev. denied* (Minn. May 31, 1995), *cert. denied*, 516 U.S. 1092 (1996).

177. 526 N.W.2d 391, 395, 399 (Minn. Ct. App. 1995), *rev. denied* (Minn. Mar. 14, 1995), *cert. denied*, 516 U.S. 818 (1995). But in 1991, the Minnesota Court of Appeals held that subjecting a Lutheran church to a terminated pastor’s sexual harassment claim under the Human Rights Act presented no burden to church practices “in light of the church’s own policy against such conduct.” *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991). “Even if this regulation would incidentally burden religious activity or belief, [the pastor] is entitled to assert this claim because the state’s interest in eradicating sexual harassment in the work place is compelling” *Id.*

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finding an article I, section 16 violation because the lawsuit involved “social or moral investment strategies” and because there was no compelling interest in solving the dispute.¹⁷⁸

Recently, the court of appeals employed article I, section 16 to examine a plaintiff church’s standing to sue over Minnesota’s “conceal and carry” law.¹⁷⁹ In affirming standing, the court preliminarily reviewed the claim’s merits, concluding that “[i]t would be disingenuous for us to deny the existence of a justiciable controversy where appellants have raised an arguably viable challenge to free exercise.”¹⁸⁰

These cases signal that article I, section 16 permits Minnesota courts to adjudicate disputes involving churches as long as neutral legal principles may be applied without judicial intrusion into church doctrine.¹⁸¹ Burden of proof appears to be a non-issue: Courts are to weigh all relevant factors at any stage of the litigation to determine whether subject-matter jurisdiction or standing are present. In addition, once a compelling governmental interest is found, it seems that something other than strict scrutiny is applied for determining whether judicial enforcement is the least-restrictive option.¹⁸²

V. FREEDOM OF SPEECH

A. *A Speech-Hostile Minnesota*

During times of peace and even of war, “Americans consistently have testified to the underlying value of free speech.”¹⁸³ Minnesotans, for their part, frequently position themselves “in the

178. 540 N.W.2d 82, 87 (Minn. Ct. App. 1995), *rev. denied* (Minn. Jan. 25, 1996), *cert. denied*, 519 U.S. 810 (1996).

179. Edina Cmty. Lutheran Church v. State, 673 N.W.2d 517, 521 (Minn. Ct. App. 2004).

180. *Id.* at 523.

181. See also Serbian Orthodox Diocese v. Milivojevic, 426 U.S. 696, 724-25 (1976) (holding that “hierarchical religious organizations” may establish rules and tribunals for “internal discipline and government” to which civil courts must defer under the First Amendment).

182. In *Odenthal*, for instance, the Minnesota Supreme Court held that the statute regulating unlicensed counselors was “tailored in a non-restrictive manner”—hardly language confirming that the least-restrictive means was employed. *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 443 (Minn. 2002) (emphasis added).

183. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 13 (1997).

forefront for protection of public debate.”¹⁸⁴ For example, after more than 400 *St. Paul Pioneer Press* readers responded to an informal survey about free speech in 2005, the opinion page editor wrote a column headlined *First Amendment Alive, Well Here* to distinguish Minnesota as being outside a national trend of hostility toward free speech.¹⁸⁵ Article I, section 3 of the Minnesota Constitution, which affirms that “all persons may freely speak, write and publish their sentiments on all subjects” and declares that the press “shall forever remain inviolate,” seems to confirm Minnesota’s prominence as a place of speech tolerance.¹⁸⁶

However, article I, section 3 also specifies that speakers are “responsible for the abuse” from exercising their rights, and Minnesota historically has led the nation not just in punishing speech but in restraining it under state law.¹⁸⁷ In 1907, the Minnesota Supreme Court cited article I, section 3 while holding that the *Pioneer Press* could be convicted for violating a state law barring newspapers from publishing specific details of executions—details, according to the court, that were likely to have “an unwholesome effect on the public mind.”¹⁸⁸ Eight years later, the court did not even mention article I, section 3 when affirming the Minneapolis mayor’s discretion to revoke a movie-theater license.¹⁸⁹ Professor William Anderson, in his 1921 treatise *A History of the Constitution of Minnesota*, observed that it was appropriate to control and punish speech when government faced “certain emergencies” such as war.¹⁹⁰ In his 1941 treatise *Free Speech in the United States*, Zechariah Chafee Jr. observed that no state eclipsed Minnesota’s use of state law to punish antiwar speech during and after World War I even though “not a single person was dissuaded from enlisting.”¹⁹¹

184. *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991).

185. Art Coulson, *First Amendment Alive, Well Here*, ST. PAUL PIONEER PRESS, Feb. 13, 2005, at 10B.

186. MINN. CONST. art. I, § 3.

187. *Id.*

188. *State v. Pioneer Press Co.*, 110 N.W. 867, 868, 100 Minn. 173, 175 (1907).

189. *Bainbridge v. City of Minneapolis*, 154 N.W. 964, 965-66, 195 Minn. 195, 198-99 (1915).

190. ANDERSON, *supra* note 76, at 159.

191. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 100-01, 287-88 (1941). Chafee observed that the Minnesota Reports contain eighteen World War I criminal prosecutions of persons charged with making speech that had a “natural and reasonable effect” of urging against military service, even though “not a single person was dissuaded from enlisting, and even though the jury found and believed

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Minnesota cases prompted the United States Supreme Court to extend the First Amendment's speech clause to the states. In *Gilbert v. Minnesota*, in which the Court affirmed a World War I pacifist's conviction under Minnesota law for making speech with a "natural and reasonable effect" to dissuade military enlistment, Justice Louis Brandeis, in his dissenting opinion, became first on the Court to write that the First Amendment applied to the states through the Fourteenth Amendment.¹⁹² Eleven years later came *Near v. Minnesota*, where the Supreme Court derailed Minnesota's effort to "wage war on the yellow press" and, in so doing, for the first time invalidated a state law under the First Amendment.¹⁹³

that the speaker had not the slightest intention of hindering enlistment or any other war service." *Id.* at 287-88.

One would have supposed that the federal Espionage Act was a sufficient safeguard against opposition to the war, but many states were not satisfied with either its terms or its enforcement, and enacted similar but more drastic laws of their own The most important of these statutes, that of Minnesota, made it unlawful to say "that men should not enlist in the military or naval forces of the United States or the State of Minnesota," or that residents of that state should not aid the United States in carrying on war with the public enemies.

Id. at 100-01. Chafee concluded that Minnesota was ripe for antiwar speech because of the "large number of farmers of German birth," and the general rural agrarian antagonism toward urban interests that stood to benefit from World War I. *Id.* at 288.

192. *State v. Gilbert*, 169 N.W. 790, 791, 141 Minn. 263, 265 (1918), *aff'd sub nom. Gilbert v. Minnesota*, 254 U.S. 325 (1920). In dissent, Justice Brandeis wrote:

As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, the right of a business man to conduct a private employment agency, or to contract outside the state for insurance of his property, although the Legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.

Gilbert v. Minnesota, 254 U.S. at 343 (Brandeis, J., dissenting) (internal citations omitted). Brandeis's dissent "was the first glimmer of the new day which was to dawn" five years later as the First Amendment speech clause was extended to the states. CHAFEE, *supra* note 191, at 297.

193. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722-23 (1931). Six years earlier, in *Gillow v. New York*, 268 U.S. 652, 666 (1925), the Court had upheld New York state's "criminal anarchy" statute and observed that "[f]or present purposes we may and do assume" that the First Amendment applied to the states. But

In both *Gilbert* and *Near*, the Minnesota Supreme Court had held that article I, section 3 did not protect the speech.¹⁹⁴ The court observed that the pacifist's words ran counter to "our purpose in the war" and the idea "that the world must be made safe for democracy,"¹⁹⁵ and that article I, section 3 was reserved only for newspapers that "publish the truth with impunity, with good motives, and for justifiable ends."¹⁹⁶ As the court said in *State v. Guilford*, the precursor to *Near*:

[O]ur Constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motive or without justifiable ends. It is a shield for the honest, careful and conscientious press. Liberty of the press does not mean that an evil-minded person may publish just anything any more than the constitutional right of free assembly authorizes and legalizes unlawful assemblies and riots. . . . [T]he Legislature is authorized to make laws to bridle the appetites of those who thrive upon scandal and rejoice in its consequences.¹⁹⁷

Article I, section 3 must be examined against this backdrop—in which the Minnesota Constitution was used not just to punish speech but also to restrict it before it could be punished. This perspective helps gauge how Minnesota courts have resolved state constitutional cases involving speech.

B. Protest Speech and Framework for Analysis

The Minnesota Supreme Court's most recent application of article I, section 3 is in *State v. Wicklund*,¹⁹⁸ the Mall of America protest case.¹⁹⁹ The holding is that when protesters' speech

because the speaker lost, the sentence sometimes is considered dictum such that *Near* may be credited with incorporating the First Amendment through the Fourteenth Amendment. See Nadine Strossen, *Frontiers of Legal Thought II, The New First Amendment: Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 565 n.411 (1990) (characterizing *Gillow's* incorporation language as dictum).

194. *State ex rel. Olson v. Guilford*, 219 N.W. 770, 772, 174 Minn. 457, 463; *State v. Gilbert*, 169 N.W. at 792, 141 Minn. at 267.

195. *Gilbert*, 169 N.W. at 791, 141 Minn. at 265.

196. *Guilford*, 219 N.W. at 771-72, 174 Minn. at 459, 462.

197. *Id.* at 772, 174 Minn. at 463. There is no Minnesota constitutional right to free assembly. See *infra* note 261 and accompanying text.

198. 589 N.W.2d 793, 794-95 (Minn. 1999).

199. *Id.*; see also *Hudgens v. NLRB*, 424 U.S. 507 (1976) (finding no First Amendment right to enter a shopping center to advertise a strike).

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interests are balanced against private property interests under the state constitution, the property owners win, particularly when the speakers' goal is provocation and not furthering a political end.²⁰⁰

Appellants' speech was directed at persuading shoppers to forgo buying fur products and to boycott Macy's in an attempt to effect change in the retail and fur industries. Its purpose was not to achieve some political goal such as a ballot initiative—it is best characterized as protest speech, intended to be provocative. We decline to extend the free speech protections of Article I, Section 3 of the Minnesota Constitution beyond those protections offered by the First Amendment.²⁰¹

This primacy of property rights is bolstered by *State v. Olson*,²⁰² where in 1970 the court invoked article I, section 3 as well as the First Amendment to uphold the disturbing-the-peace conviction of a protester who intended to “create a dialogue” at a Minneapolis Catholic church during Mass by accusing the priest of “hypocrisy” in a “loud and angry tone.”²⁰³ Neither the state nor federal constitution, according to the court, prohibited criminal sanctions to curb “insulting remarks and bizarre behavior.”²⁰⁴

Besides providing a relevant balancing test, *Wicklund* also suggests to practitioners a framework, open to criticism, that the Minnesota Supreme Court might follow when examining speech claims under the state constitution.²⁰⁵ As mentioned previously, the court identified its “first consideration” not as what the plain language of article I, section 3 said, but as what the Minnesota Constitution's framers intended by drafting the provision more broadly than the First Amendment.²⁰⁶ Finding no intent to depart, the “next question” for the court was whether there was “sound reason” for departing from the federal standard.²⁰⁷ The court found no reason to depart, distinguishing decisions in which the court had extended state constitutional rights to privacy and to counsel, as well as article I, section 3 cases involving commercial

200. *Wicklund*, 589 N.W.2d at 798-99, 801.

201. *Id.* at 801.

202. 178 N.W.2d 230, 231, 287 Minn. 300, 301 (1970).

203. *Id.*

204. *Id.* at 232, 287 Minn. at 304.

205. 589 N.W.2d at 794-95.

206. *Id.* at 798-99; see also *supra* notes 84-86 and accompanying text.

207. *Wicklund*, 589 N.W.2d at 799.

speech, obscenity, and freedom of the press.²⁰⁸

Next, after observing that most states apply their speech provisions no differently than the First Amendment, the court confronted speech in shopping malls and observed that a “small minority” of states afford stronger protections under state constitutions but typically “under the cloak of another constitutional provision” related to the political process.²⁰⁹ Given that the Mall of America protesters intended to provoke instead of politick, the court denied them access to the mall under the Minnesota Constitution.²¹⁰

The court was correct that courts commonly do not affirm independent state constitutional protections for speech, including in shopping malls,²¹¹ and the court is not alone in ignoring the constitution’s plain language.²¹² But by distinguishing the fur protesters from those who might further a “political goal such as a ballot initiative,”²¹³ one wonders whether the court might deviate from its *Wicklund* analysis by examining article I, section 3’s plain language and, under certain circumstances, side with persons seeking mall access for purely political purposes.²¹⁴ Besides, few places other than Minnesota may boast of a public-private place quite like the Mall of America.²¹⁵

Although Minnesota’s World War I protest cases could have been dismissed as irrelevant just a few years ago, recent campaigns against global terrorism suggest that the cases should not be discarded. Among the earliest and most illustrative is *State v. Holm*,²¹⁶ where the Minnesota Supreme Court punished pamphleteers who characterized the war as “arbitrarily declared

208. *Id.* at 799-800.

209. *Id.* at 800-01 (citing *Prune Yard Shopping Ctr. v. Robins*, 592 P.2d 341 (Cal. 1979), *aff’d*, 447 U.S. 74 (1980); *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590 (Mass. 1983); *N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *Lloyd Corp., Ltd. v. Whifen*, 849 P.2d 446 (Or. 1993)).

210. *Wicklund*, 589 N.W.2d at 801.

211. *See, e.g.*, *City of W. Des Moines v. Engler*, 641 N.W.2d 803, 806 (Iowa 2002); *Jacobs v. Major*, 407 N.W.2d 832, 843-44 (Wis. 1987).

212. *See, e.g.*, *supra* notes 69-70 and accompanying text.

213. *Wicklund*, 589 N.W.2d at 801.

214. *See Jacobs*, 407 N.W.2d at 849 (Abrahamson, J., concurring in part, dissenting in part) (observing that shopping-mall management “exercises an enormous power when it denies political speakers access to such a center of community life”).

215. *See supra* note 68 and accompanying text.

216. 166 N.W. 181, 181, 139 Minn. 267, 271 (1918).

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against the will of the people,” claimed that “the President and Congress have forced this war upon the United States[,]” and concluded that “the integrity of the country is being menaced” in favor of Wall Street interests.²¹⁷ The defendants’ punishment appeared based both on article I, section 3 and the First Amendment, and the rationale was affirmed in several more cases.²¹⁸ Eventually, laws such as Minnesota’s that punished speech based on bad tendencies or “natural” effects were struck down.²¹⁹

The future of punishing and preventing war-protest speech under state and federal constitutions is not clear given the nation’s ongoing response to the 2001 terrorist attacks. As Professor David M. Rabban wrote in 1997, “when politics does not go well, and produces a Red Scare or a McCarthy Era or some other state enforcement of ‘political correctness,’ the right to free speech may serve important purposes for society as well as individuals.”²²⁰ But as First Amendment scholar Eugene Volokh observed in 2005, “making fear of terrorism an ‘underlying theme of domestic and foreign policy’ is quite proper when terrorists are doing frightening things.”²²¹

217. *Id.*

218. *Id.*; see also *State v. Randall*, 173 N.W. 425, 143 Minn. 203 (1919); *State v. Gilbert*, 169 N.W. 790, 141 Minn. 263 (1918); *State v. Kaercher*, 169 N.W. 699, 141 Minn. 186 (1918); but see *State v. Townley*, 168 N.W. 591, 594, 140 Minn. 413, 423 (1918) (holding that speech did not violate the statute because it was “nothing more serious than a rhetorical, and somewhat flamboyant, platform”).

219. A year after *Holm*, in 1919, the United States Supreme Court held in *Schenck v. United States* that speech that presents a “clear and present danger” to wartime interests may be restrained by the federal Espionage Act. 249 U.S. 47, 52 (1919). Six years later, in *Gillow v. New York*, the Court upheld New York state’s “criminal anarchy” statute that criminalized speech that “advocates, advises or teaches” overthrow of the government. 268 U.S. 625, 626 (1925). Arguably, this decision invalidated broad laws such as Minnesota’s that examined speech for bad tendencies or “natural” effects. The “clear and present danger” test resurfaced after the United States entered World War II when the Smith Act criminalized speech (by Communists) that advocated the government’s overthrow. *Dennis v. United States*, 341 U.S. 494 (1951). The final Smith Act conviction was affirmed in *Scales v. United States*, 367 U.S. 203 (1961). Deference to the government’s determination of what constitutes danger eroded during the Vietnam War, evidenced by the Court’s refusal in the “Pentagon Papers” case to bar newspapers from publishing classified war details. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

220. RABBAN, *supra* note 183, at 393. However, “[s]ubstantial doubts can more generally be raised as to whether any constitutional standard, however protective its language, can safeguard free speech in times of crisis.” *Id.* at 379.

221. Eugene Volokh, *Deterring Speech: When Is It “McCarthyism”? When Is It Proper*, 93 CAL. L. REV. (forthcoming 2005); see also Carpenter, *supra* note 38, at

C. *Prior Restraint*

When government prohibits speech, it commits prior restraint—"the most serious and the least tolerable infringement on First Amendment rights."²²² Given the interstate and international natures of communication, it seems imprudent to decide prior restraint cases solely under state constitutional law. Nevertheless, cases decided under article I, section 3 reveal a sobering willingness among the Minnesota judiciary to restrain the news media from disseminating information simply because legislators considered it injurious.

In *State v. Pioneer Press Co.*,²²³ the ninety-eight-year-old case upholding a state statute forbidding newspapers from detailing public executions, the Minnesota Supreme Court acknowledged that article I, section 3 was "directly aimed at the removal of previous restraints upon public speech and freedom of the press," but that "it does not follow that there is a constitutional right to publish every fact or statement which may be true."²²⁴ The court deemed it permissible to report an execution's occurrence but impermissible to describe the prisoner's transport to the scaffold, his last statement, his noose and "black cap," and, after the "springing of the trap," the body's removal.²²⁵ The supreme court gave remarkable deference to the legislature's effort to "surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind."²²⁶

Pioneer Press was cited for support twenty-one years later in *State v. Guilford*,²²⁷ the case that became *Near v. Minnesota*.²²⁸ Hennepin County prosecutor (and eventual governor) Floyd B. Olson wielded the Public Nuisance Law of 1925 to "wage war on the yellow press"

625. "In an emergency, where there will be no time or opportunity for counter-speech to prevent some evil, the [speech-protective] antipaternalism principle will not stand in the way of government speech restrictions designed to avoid it." *Id.*

222. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

223. 110 N.W. 867, 868, 100 Minn. 173, 176 (1907).

224. *Id.*

225. *Id.* at 867, 100 Minn. at 174.

226. *Id.* at 868, 100 Minn. at 175. "[I]f, in the opinion of the Legislature, it is detrimental to public morals to publish anything more than the mere fact that the execution has taken place, then, under the authorities and upon principle, the appellant was not deprived of any constitutional right in being so limited." *Id.* at 868-69, 100 Minn. at 177.

227. 219 N.W. 770, 772, 174 Minn. 457, 461 (1928).

228. 283 U.S. 697 (1931).

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by enjoining publishers who “customarily” produce, publish, circulate, possess, or give away a newspaper deemed “malicious, scandalous and defamatory”²²⁹ Olson’s specific targets were Howard A. Guilford and Jay M. Near who, among other things, reported “links between gambling syndicates and the police,” and printed accusations of election fraud in their “sensational” weekly newspaper, the *Saturday Press*.²³⁰ A district judge enjoined the publishers and certified to the Minnesota Supreme Court the question of the Public Nuisance Law’s constitutionality in light of article I, section 3’s directive that press liberty “shall forever remain inviolate.”²³¹ Accordingly, the supreme court held that article I, section 3 protected only those who publish “with good motives, and for justifiable ends”²³²

Between *Pioneer Press* and *Guilford* came *Campbell v. Motion Picture Machine Operators’ Union of Minneapolis*, where the Minnesota Supreme Court applied antitrust law to enjoin the weekly *Minneapolis Labor Review*, a union mouthpiece, from publishing statements claiming that a theater owner was unfair to organized labor.²³³ The court rejected the newspaper’s argument that the free speech right in “the Constitution”—presumably Minnesota’s—was infringed, explaining that the newspaper went beyond merely notifying the public of a controversy.²³⁴ The court likened the newspaper’s pro-union campaign to an intentional tort against property: “The right of free speech is abused when words become verbal acts, and are then as much subject to injunction as the use of any other force whereby property is wrongfully injured.”²³⁵

229. *State v. Guilford*, 219 N.W. 770, 771, 174 Minn. 457, 458 (1928); FRED W. FRIENDLY, MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM, AND THE CASE THAT SAVED FREEDOM OF THE PRESS 21, 50 (Univ. of Minn. 2003) (1981).

230. FRIENDLY, *supra* note 229, at 39.

231. *Id.* at 53.

232. *Guilford*, 219 N.W. at 772, 174 Minn. at 462. A year later, Guilford and Near argued to the Minnesota Supreme Court that they were prevented from publishing “any kind of newspaper,” in violation of article I, section 3 and state and federal due process rights. *State v. Guilford*, 228 N.W. 326, 326, 179 Minn. 40, 41 (1929). The court dismissed the claims, observing that the publishers still could operate a newspaper “in harmony with the public welfare.” *Id.*

233. *Campbell v. Motion Picture Mach. Operators’ Union of Minneapolis*, 186 N.W. 781, 781-82, 151 Minn. 220, 224, 226 (1922).

234. *Id.* at 785, 151 Minn. at 232.

235. *Id.*

D. Newsgathering

Apart from the right to publish news is the right (or lack of a right) to gather news. Given the cross-jurisdictional nature of newsgathering today, using state constitutions to ensure journalists' rights might be imprudent. Nevertheless, the Minnesota Supreme Court has considered newsgathering cases in light of article I, section 3.²³⁶

Journalists are subject to generally applicable laws. The United States Supreme Court made this point clearly in *Cohen v. Cowles Media Co.*,²³⁷ another case originating in Minnesota with eventual article I, section 3 undertones. The Court held that the First Amendment did not bar a promissory estoppel suit against the two Twin Cities daily newspapers that dishonored promises not to publish a confidential source's name.²³⁸ In his majority opinion, Justice Byron R. White urged the Minnesota Supreme Court on remand to consider whether article I, section 3 barred such a suit.²³⁹ In response, the state supreme court acknowledged that it "may, of course, construe our free speech provision to afford broader protection than the federal clause," but bowed to the First Amendment because the "full First Amendment implications" of reporter-source agreements remained unclear.²⁴⁰

Four years later, in *State v. Turner*, the court again examined

236. See *State v. Turner*, 550 N.W.2d 622, 624-25 (Minn. 1996); *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992); *Northwest Publ'ns, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977).

237. 501 U.S. 663 (1991).

238. *Id.* at 669-70. *Star Tribune* (Minneapolis) and *Pioneer Press* (St. Paul) reporters had agreed not to publish the name of a political source who provided damaging information about a rival candidate for Minnesota governor. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990). Editors overruled the reporters after deciding that the attempted "smear" campaign was newsworthy. *Id.* at 201. The source, Dan Cohen, sued for fraudulent misrepresentation and breach of contract. *Id.* at 202. The applicability of promissory estoppel surfaced only during oral argument before the Minnesota Supreme Court, which held that applying promissory estoppel law would violate the First Amendment because it would chill political speech at the First Amendment's core. *Id.* at 204 n.5, 205. Cohen had no cause of action for defamation because the newspapers' reports were true. *Id.* at 202.

239. *Cohen*, 501 U.S. at 672. "The [Minnesota Supreme Court] opinion did not refer to freedom of the press under the Minnesota Constitution. Perhaps defendants' counsel, like New York's media lawyers, believed only in the First Amendment." Linde, *supra* note 57, at 219.

240. *Cohen*, 479 N.W.2d at 391.

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article I, section 3 protections for newsgatherers.²⁴¹ At issue was whether a *Pioneer Press* photographer could resist a criminal defendant's subpoena seeking the photographer's testimony and unpublished photographs related to the defendant's arrest, which the photographer had chronicled while riding with St. Paul police officers.²⁴² In interpreting article I, section 3, the Minnesota Supreme Court again followed federal precedent to hold that it did "not see how requiring a news photographer to testify regarding events he personally witnessed during the pursuit and arrest of an alleged drug offender will infringe upon our state constitution's guarantee of free speech and publication."²⁴³

The court has signaled that there might be a state constitutional right to gather news from criminal-case files. In *Northwest Publications, Inc. v. Anderson*, the court noted the relevance of article I, section 3 as well as the First and Fourteenth Amendments to the United States Constitution to direct that newspapers were to receive access to court files from two high-profile homicides.²⁴⁴ The court held that although court files may be restricted in a "rare or extraordinary case," the petitioner seeking closure has the burden of establishing a "strong factual basis," and the district court must make specific findings after considering "all alternatives to the exceptional remedy"²⁴⁵

E. Adult Speech

In *State v. Davidson*, a 1992 case in which the manager of an adult bookstore challenged his obscenity conviction under the state constitution, the Minnesota Supreme Court again found "no reason to apply our constitution differently" than the First Amendment and without dissent affirmed the conviction under

241. 550 N.W.2d 622, 628 (Minn. 1996).

242. *Id.* at 624-25.

243. *Id.* at 628-29. But the court did order *in camera* review of the unpublished photographs to balance "the defendant's need for evidence" against "overburdening the news media." *Id.* at 629.

244. 259 N.W.2d 254, 257 (1977). The court files referred to the August 1977 shooting death of Shirleen Howard in Winona and the arrest of her husband and the June 1977 death of Elizabeth Congdon and her nurse, Velma Pietila, in Duluth, and the arrest of Congdon's son-in-law. *Id.* at 255-56.

245. *Id.* at 257. The court characterized the case as one of "prior restraint," but the opinion does not suggest that the newspapers were barred from publishing information that they possessed. *Id.* Accordingly, the case is better characterized as one involving newsgathering.

article I, section 3.²⁴⁶ Essentially, the court held that although the state constitution ensures that persons may speak on all subjects, the fact that speakers may be “responsible for the abuse”—including for peddling obscenity, which the court noted is unprotected by the First Amendment—is paramount.²⁴⁷

Today, state constitutions may be of limited use in obscenity cases now that pornography typically is found not in local bookstores but on the global internet. But for purely local “adult speech” such as nude dancing, article I, section 3 remains relevant and, judging by the Minnesota Supreme Court’s most-recent case on the subject, is ripe for reconsideration.²⁴⁸

Knudtson v. City of Coates involved a municipality’s power to ban nude dancing in establishments with liquor licenses.²⁴⁹ Writing for a four justice-majority, Justice Simonett characterized nude dancing as “expressive conduct” and “hybrid speech” under article I, section 3, but largely echoed the United States Supreme Court in observing that an ordinance banning nude dancing “can be viewed as a reasonable exercise of the municipality’s police powers” and that any “curtailment of free expression is nominal and incidental and insufficient to cancel the public welfare concerns of the community.”²⁵⁰ Chief Justice Keith purported to join the court’s opinion, but in a special concurrence doubted whether article I, section 3 protected nude dancing in public places,²⁵¹ and in so doing, arguably deprived *Knudtson* of precedential force.

A dissent by Justice Sandra S. Gardebring, joined by Justices

246. 481 N.W.2d 51, 55, 57 (Minn. 1992). The anti-obscenity statute, section 617.241 of Minnesota Statutes, mirrors the First Amendment definition of obscenity: “the work, taken as a whole, appeals to the prurient interest in sex and depicts or describes in a patently offensive manner sexual contact . . . which, taken as a whole, does not have serious literary, artistic, political, or scientific value.” MINN. STAT. 617.241, subd. 1(a) (2004); *see also* *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity).

247. *State v. Davidson*, 481 N.W.2d at 56, 57; *see also* Mark D. Salsbury, Note, *Questions of Vagueness and State Constitutional Legitimacy: The State Constitutional Challenge to Minnesota’s Obscenity Statute: State v. Davidson*, 481 N.W.2d 51 (Minn. 1992), 16 HAMLINE L. REV. 281, 318 (1992) (criticizing *Davidson* as “expos[ing] Minnesota Constitutional analysis to attack as being arbitrary and selective”).

248. *See Knudtson v. City of Coates*, 519 N.W.2d 166 (Minn. 1994).

249. *Id.* at 167.

250. *Id.* at 169; *see also* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 568 (1991) (characterizing nudity as “expressive conduct” on the “outer perimeters of the First Amendment,” which may be regulated to further “societal order and morality”).

251. *Knudtson*, 519 N.W.2d at 170 (Keith, C.J., concurring).

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Esther M. Tomljanovich and Alan C. Page, called the majority's opinion a "staggering departure from our history of providing significant protection of individual rights under the state constitution."²⁵² Justice Gardebring characterized the holding as "frightening" and feared it would "make the Minnesota Constitution largely irrelevant to the ongoing debate on the parameters of free speech in this country":

The rule of law announced today may not appear dangerous to a free society when applied to nude dancing, but it is no less available in the constitutional analysis of other types of speech. The majority, with scant analysis, has abandoned a worthy history of providing significant protection for individual rights under the state's constitution and approved an unprecedented and frightening approach to free speech analysis.²⁵³

Given this discord, the fact that only Justice Page (a *Knudtson* dissenter) remains on the court, the shifts in the United States Supreme Court's First Amendment analyses, the localized nature of nude dancing, and the general willingness of nude-dancing establishments to pay for litigation, it seems likely, if not necessary, that these state constitutional standards will be reconsidered.

Minnesota courts might find guidance in Oregon, where in 2005 the state supreme court referenced the state constitution's "sweeping" right to free expression and employed established state constitutional precedent to invalidate a state law and local ordinance restricting sexually oriented public nudity.²⁵⁴ The Oregon court acknowledged that even unpopular expression must be protected under the state constitution: "[T]he words are so clear and sweeping that we think we would not be keeping faith with the framers who wrote them if we were to qualify or water them down, unless the historical record demonstrated clearly that the framers meant something other than what they said."²⁵⁵

252. *Id.* at 170 (Gardebring, J., dissenting).

253. *Id.* at 172.

254. *State v. Ciancanelli*, 121 P.3d 613, 629 (Or. 2005); *City of Nyssa v. Dufloth*, 121 P.3d 639, 642 (Or. 2005). The Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." OR. CONST. art I, § 8.

255. *Ciancanelli*, 121 P.3d at 629. "[I]t appears to us to be beyond reasonable dispute that the protection extends to the kinds of expression that a majority of citizens in many communities would dislike—profanity, blasphemy, pornography—and even to physical acts, such as nude dancing or other explicit

F. Commercial Speech

Commercial speech receives less First Amendment protection than social, political, or religious speech, and under the United States Supreme Court's *Central Hudson* test may be regulated if it is unlawful and misleading and if regulation would further a substantial governmental interest.²⁵⁶ Given the multi-jurisdictional nature of commerce, relying solely on the state constitution to resolve commercial speech cases seems imprudent. Nevertheless, in 1992 the Minnesota Supreme Court examined article I, section 3 twice in the commercial speech context and incorporated *Central Hudson* into the state constitutional analysis.²⁵⁷

In *Minnesota League of Credit Unions v. Minnesota Department of Commerce*, the court again signaled that article I, section 3 may provide greater protection than the First Amendment, but concluded that *Central Hudson* adequately protected the parties' rights.²⁵⁸ Less than five months later, in *State v. Casino Marketing Group, Inc.*, the chance that article I, section 3 would be interpreted independent from the First Amendment for commercial speech dissipated when the supreme court proclaimed its "general accord" with *Central Hudson* and found "no reason" to interpret the state constitution differently.²⁵⁹ But the Oregon Supreme Court deviated

sexual conduct, that have an expressive component." *Id.*

256. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the United States Supreme Court set a four-part test for determining whether government may regulate or otherwise restrict commercial speech: (1) the lawful or misleading nature of the speech, (2) the government interest's substantiality, (3) whether the regulation directly advances the government's interest, and (4) whether the regulation "is not more extensive than necessary to serve that interest." 447 U.S. 557, 566 (1980); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (characterizing *Central Hudson* as "an adequate basis for decision" and clarifying that the standard of the fourth prong of the test is not the "least restrictive means" but a narrowly tailored "reasonable fit" between the ends and the means). The Minnesota Supreme Court has defined commercial speech as "expression related solely to the economic interest of the speaker and its audience" that does "no more than propose a commercial transaction, such as price advertising." *State v. Century Camera, Inc.*, 309 N.W.2d 735, 739 (Minn. 1981) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

257. See *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 403-04 (Minn. 1992); *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 883-84, 885 n.2, 892 (Minn. 1992).

258. 486 N.W.2d at 403-04. The case involved a rule allowing the state to secure a statement from credit unions agreeing to nonsolicitation of certain members. *Id.* at 401.

259. *Casino Mktg. Group*, 491 N.W.2d at 883-84, 885 n.2, 892. At issue was a law

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from *Central Hudson* in a telemarketer-regulation case factually similar to *Casino Marketing Group* and invalidated a state law solely on state constitutional grounds.²⁶⁰

G. Gaps in Coverage

A few words are necessary on areas parallel to the First Amendment where the Minnesota Constitution provides no protections. Due to an apparent oversight during the 1857 constitutional conventions, there is no state constitutional right to assembly.²⁶¹ And thus far, Minnesota state restrictions on campaign financing and lobbying have been resolved only under the First Amendment.²⁶² But the most remarkable gap is the lack of a provision or a definitive state-constitutional interpretation concerning defamation, one of the most important, controversial, and confusing intersections between state tort law and constitutional law.²⁶³

In defamation decisions spanning three centuries, the Minnesota Supreme Court has barely mentioned the state constitution despite article I, section 3's specific provision that speakers and the press are to be "responsible for the abuse" of their speech.²⁶⁴ The court has bowed to federal law, including the

barring telemarketers from using automatic dialing machines unless the telephone subscriber consented to receive the messages or a live operator preceded the prerecorded message. MINN. STAT. § 325E.27 (1992).

260. Moser v. Frohnmayer, 845 P.2d 1284, 1285, 1287-88 (Or. 1993).

261. At the conventions, Democrats and Republicans included peaceful-assembly provisions in their versions of the constitution, but the document emerging from conference committee contained no such provision and "no one chanced to notice the omission and the constitution was adopted without guaranteeing this right." MORRISON, THE MINNESOTA STATE CONSTITUTION, *supra* note 7, at 2; *accord* ANDERSON, *supra* note 76, at 118; *cf.* WIS. CONST. art. 1, § 4 (right to assemble and petition). A Minnesota Constitutional Study Commission convened in 1971 recommended that a freedom of assembly provision be added, but a provision was not added. *See Comments on the Restructured Constitution of 1974*, in 1 MINN. STAT. ANN., *supra* note 77, at 129, 138.

262. *See* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (invalidating 1993 alterations to state campaign finance laws under First Amendment); Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am., 761 F.2d 509 (8th Cir. 1985), *cert denied*, 474 U.S. 1082 (1986) (holding that Minnesota law requiring lobbyists to register does not violate First Amendment right of association).

263. "The law of defamation is a complex mix of competing interests, and has not been viewed by legal scholars as either rational or clear in application" Bolton v. Dep't of Human Servs., 540 N.W.2d 523, 525 (Minn. 1995).

264. MINN. CONST. art. I, § 3; *accord* WIS. CONST. art. I, § 3 (addressing criminal libel actions); *see also* RABBAN, *supra* note 183, at 155 (explaining that provision

“actual malice” standard from *New York Times v. Sullivan*,²⁶⁵ or has avoided constitutional issues altogether by turning to statutory or common law.²⁶⁶ But the *New York Times* principles came from state defamation law,²⁶⁷ which in Minnesota protected good-faith defamatory statements against public officials decades before *New York Times* was decided.²⁶⁸

Because defamation, like obscenity and commercial speech, increasingly occurs across and without regard to jurisdictional boundaries, relying solely on the state constitution to resolve defamation cases seems unwise.²⁶⁹ But if the United States Supreme

addressing abuse of speech right is “often invoked in libel and contempt cases” in other states).

265. The Court held that the First Amendment requires a showing of “actual malice” before a state may use tort law to prevent or punish criticism of public officials. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964); *see also* *Beatty v. Republican Herald Publ’g Co.*, 189 N.W.2d 182, 184, 291 Minn. 34, 37 (1971) (“State laws of libel and slander were drastically curtailed by the case of *Sullivan vs. New York Times*.”); Note, *Minnesota Defamation Law and the Constitution, First Amendment Limitation on the Common Law Torts of Libel and Slander*, 3 WM. MITCHELL L. REV. 81, 82-83 (1977). Minnesota is not unique in bowing to federal law: “the briefs and literature rarely, if ever, mention the state constitutions.” Linde, *supra* note 27, at 384.

266. *See, e.g.*, *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 675 (Minn. 2003) (requiring a newspaper reporter, under section 595.025 of Minnesota Statutes, to disclose the identity of a confidential source in a defamation action to which reporter was not a party); *Chafoulas v. Peterson*, 668 N.W.2d 642, 648-49, 652-54 (Minn. 2003) (referencing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967); *Sullivan*, 376 U.S. 254 (1964)); *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 327-329 (Minn. 2000) (tracing federal history of defamation law); *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27-28 (Minn. 1996); *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990) (“While first amendment and other policy considerations underlie this restraint [against punishing even some defamatory statements], we note our decision here is rooted in state defamation law.”).

267. *Sullivan*, 376 U.S. at 279 n.20 (citing state decisions including *Friedell v. Blakely Printing Co.*, 203 N.W. 974, 975, 163 Minn. 226, 230 (1925)).

268. *Friedell*, 203 N.W. at 975, 163 Minn. at 231 (1925); *see also* Note, *supra* note 265, at 114 (observing that *N.Y. Times Co. v. Sullivan* did not have large impact in the state “because Minnesota had adopted, decades before, a rule giving special protection to criticism of public officials”).

269. *See, e.g.*, *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002), *cert. denied*, 538 U.S. 906 (2003). In *Griffis*, the Minnesota Supreme Court did not permit enforcement of an Alabama defamation judgment against a Minnesota defendant who had posted allegedly defamatory remarks about an Alabama resident on an internet newsgroup. *Id.* at 530, 536. The court determined that Alabama did not have personal jurisdiction over the Minnesota defendant: “The fact that messages posted to the newsgroup *could* have been read in Alabama, just as they *could* have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant’s conduct.” *Id.* at 536.

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Court begins dismantling *New York Times* and its progeny, article I, section 3 of the Minnesota Constitution should be used to ensure that Minnesotans may “freely speak, write and publish their sentiments” on public officials and public concerns.²⁷⁰

VI. CONCLUSION

The Minnesota Constitution’s provisions on speech and religion protected Minnesotans decades before the First Amendment did. But when faced with a state constitutional claim involving religion or speech, the state’s courts too often ignore the constitution’s plain language to focus their analyses on the elusive “framers’ intent” and the arguably irrelevant inquiry of whether there is sound reason to depart from the First Amendment.

But shifts in First Amendment ideology are lurking, and the Establishment Clause risks becoming a miasma. Rewind to 1990, when the United States Supreme Court redefined parameters of the Free Exercise Clause and the Minnesota Supreme Court led the nation by wielding its state constitution in response.²⁷¹ The Minnesota Constitution’s plain language protecting speech should no longer be ignored. For guidance, Minnesota might look to Oregon, where the state constitution’s “sweeping” independent protection for expression was recently reaffirmed.²⁷² It is time for the mist to lift and the “renaissance of constitutional recognition” that Judge Nordby described in 2002 to spread to cases involving establishment of religion and speech.

270. New York has taken this tack. See *Immuno AG v. J. Moor-Jankowski*, 567 N.E.2d 1270, 1281 (N.Y. 1991), *cert. denied*, 500 U.S. 954 (1991).

271. See Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 854, 854 n.69 (1992) (observing that “[s]ome state courts will do no better than the federal courts, but some will do much better”—including, judging by *Hershberger* and *French*, the Minnesota Supreme Court); McConnell, *supra* note 16, at 1417 (observing in 1990 article that “legitimacy of [free exercise] doctrine has increasingly come under attack, and the survival of the principle of free exercise exemptions is very much in doubt”).

272. The Oregon Supreme Court recently reaffirmed a two-part test for determining whether a law violates the state constitution’s speech provision: (1) does the law restrain or restrict speech or expression, and if so (2) is it not protected because it is “wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted”? *State v. Ciancanelli*, 121 P.3d 613, 621 (Or. 2005) (citing *State v. Robertson*, 649 P.2d 569, 576 (Or. 1983)); see also *City of Nyssa v. Duffloth*, 121 P.3d 639, 643-44 (Or. 2005). But article I, section 8 of the Oregon Constitution must be distinguished because it commands that “[n]o law shall be passed restraining the free expression of opinion,” thereby requiring state action.